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TRANSCRIPT OF RECORD

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No. 231

ANNA DESPER, ADMINISTRATRIX OF THE ESTATE OF THOMAS J. DESPER, JR., DECEASED,

Petitioner,

vs.

STARVED ROCK FERRY COMPANY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No.

ANNA DESPER, ADMINISTRATRIX OF THE ESTATE OF THOMAS J. DESPER, JR., DECEASED,

Petitioner,

vs.

STARVED ROCK FERRY COMPANY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

INDEX.

Index to printed record of proceedings in the United States District Court i

Clerk's Certificate to the printed record 271

Index to record of proceedings in the United States Court of Appeals:

- Placita 273
- Hearing and Submission, entered February 9, 1951 273
- Opinion by Lindley, C. J., filed March 20, 1951 274
- Judgment Reversing and Remanding, entered March 20, 1951 283
- Order extending time for filing Petition for Rehearing, entered March 30, 1951 284
- Petition for Rehearing, filed April 24, 1951 284
- Order extending time for filing Answer to Petition for Rehearing, entered May 1, 1951 285
- Order Denying Petition for Rehearing, entered May 14, 1951 286
- Answer to Petition for Rehearing, filed May 15, 1951 286
- Designation of Record, filed May 15, 1951 287
- Clerk's Certificate 289

TRANSCRIPT OF RECORD.

IN THE

United States Court of Appeals

for the Seventh Circuit

No. 10257

ANNA DESPER, Administratrix of the Estate of THOMAS J. DESPER, JR., Deceased,

Plaintiff-Appellee,

vs.

STARVED ROCK FERRY COMPANY,

Defendant-Appellant.

U. S. Ct. of A.—7
FILED
OCT 30 1950
CLERK

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

TRANSCRIPT OF RECORD FILED SEPT. 1, 1950.

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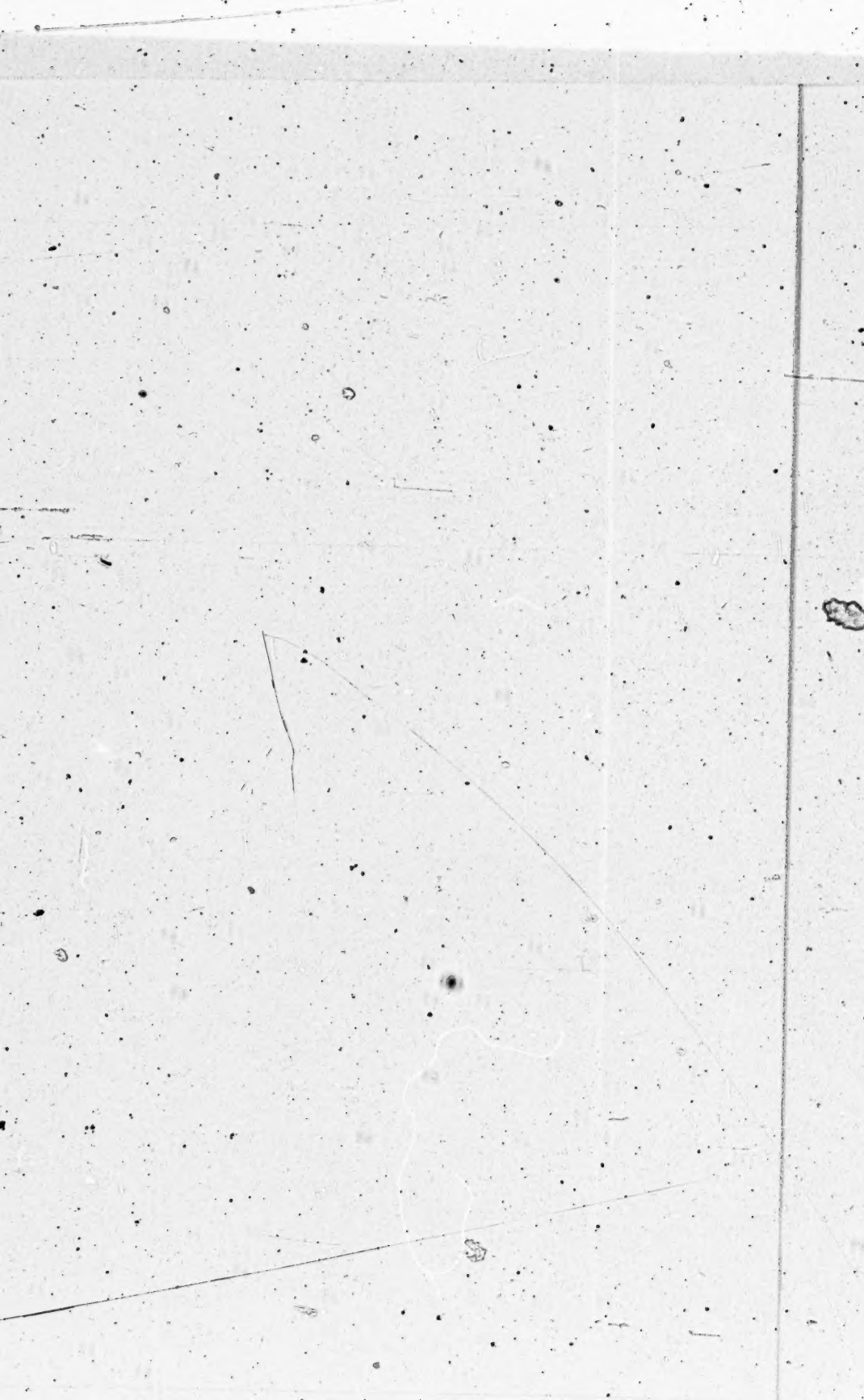

IN THE

United States Court of Appeals

For the Seventh Circuit

No. 10257

ANNA DESPER, Administratrix of the Estate of
THOMAS J. DESPER, JR., Deceased,
Plaintiff-Appellee,

vs.

STARVED ROCK FERRY COMPANY,
Defendant-Appellant.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.

INDEX.

	PAGE
Placita	1
Statement Pursuant to Rule 10(b) of the Rules of United States Court of Appeals 7th Circuit	2
Complaint	3
Summons	5
Answer	6
Motion for Stay of Proceedings	8
Exhibit "A"—Application for Adjustment of Claim	15
Exhibit "B"—Decision of Arbitrator	18
Exhibit "C"—Letter dated Dec. 14, 1949	20
Exhibit "D"—Letter dated Dec. 16, 1949	21
Exhibit "E"—Petition for Review of Decision of Arbitrator	22
Order of Court, Feb. 7, 1950	24
Order of Court, April 19, 1950	24
Motion filed April 20, 1950	25
Amended Answer	25
Exhibit "A"—Application for Adjustment of Claim	33
Exhibit "B"—Decision of Arbitrator	36
Exhibit "C"—Letter dated Dec. 14, 1949	38
Exhibit "D"—Letter dated Dec. 16, 1949	39
Exhibit "E"—Petition for Review of Decision of Arbitrator	40
Order of Court, April 20, 1950	42
Order of Court, April 24, 1950	43
Amended Complaint	44
Answer to Amended Complaint	46
Reply	47
Transcript of Proceedings	48

WITNESSES.

	PAGE
For Plaintiff:	
Frank Bazzoni—	
Direct Examination	49
Cross Examination	56
Recross Examination	59
Recross Examination	59
Robert Kennedy—	
Direct Examination	60
Cross Examination	75
Redirect Examination	84
James Desper—	
Direct Examination	85
Cross Examination	95
George Claudnic—	
Direct Examination	96, 111
Cross Examination	123
Redirect Examination	135
Recross Examination	139
Redirect Examination	139
Recross Examination	140
Redirect Examination	140
George W. Zuelow—	
Direct Examination	144
Cross Examination	146
Redirect Examination	147
Thomas P. McMaster—	
Direct Examination	148
Cross Examination	149
Michael H. Arnold—	
Direct Examination	152
Cross Examination	159
Robert Kennedy (recalled)—	
Cross Examination	160
Redirect Examination	161

PAGE

Anna Marie Desper—
Direct Examination 163
Cross Examination 165
Redirect Examination 167
Recross Examination 167

For Defendant:
Steve Doolan—
Direct Examination 169
Cross Examination 171

Michael Lewis—
Direct Examination 172
Cross Examination 173

George Claudnic—
Direct Examination 174
Cross Examination 178
Redirect Examination 181
Recross Examination 182

Instructions to Jury 207

Certificate of Reporter 218

EXHIBITS.

Plaintiff's:

Exhibit 1—Photograph taken from top of Buffalo Rock (Camera pointing North-East) 219

Exhibit 2—Photograph taken from Buffalo Rock looking East 221

Exhibit 3—Photograph on top of Buffalo Rock looking North-East 221

Exhibit 4—Photograph of Area (Camera pointing South) 222

Exhibit 5—Enlarged map—Dept. of the Army showing measured mile strip in which Buffalo Rock and Edwards Run is located 223

PAGE.

Exhibit 11—U. S. Army Engineering Corps Map of Illinois River showing Starved Rock Lock and Dam, Buffalo Rock and Edwards Run 225

Exhibit 12—License of U. S. Dept. of Commerce for operator of Motor Boats 224

Defendant's:

Exhibit 1—Accounting of Wages—Thomas Desper 227

Exhibit 3—Photograph of Houseboat looking South-West 228

Exhibit 4—Photograph of Houseboat looking South-East 229

Exhibit 5—Photograph looking South-West 230

Exhibit 6—Photograph looking East 230

Exhibit 7—Photograph looking East from boat 231

Exhibit 8—Photograph looking South 231

Exhibit 9—Photograph looking South 232

Exhibit 10—Close-up Photograph of boat looking West 233

Exhibit 11—Photograph of Yard pointing East directly at Houseboat 234

Exhibit 12—Photograph looking South showing corner of Houseboat 235

Exhibit 13—Photograph looking South-West showing all of Houseboat 235

Exhibit 14—Photograph taken on dock of Houseboat looking North-East 236

Exhibit 15—Photograph of Boat (Camera pointing South-West) 236

PAGE

Exhibit 16—Workmen's Compensation Insurance Certificate 237

Exhibit 17—Application for Adjustment of Claim.... 239

Exhibit 18—Payment of Compensation..... 248

Motions filed April 24, 1950..... 249

Verdict of Jury..... 250

Motion for Judgment Notwithstanding the Verdict of the Jury 251

Motion for a New Trial..... 251

Order of Court filed May 25, 1950..... 252

Order of Court filed June 28, 1950..... 253

Notice of Appeal..... 253

Certificate of Mailing..... 254

Bond on Appeal..... 254, 256

Certificate of Notary Public..... 256, 257

Statement of Points Upon which Defendant-Appellant Relies on Appeal..... 258

Order of Court filed July 25, 1950..... 264

Designation of Record..... 264

Stipulation 266

Order of Court filed August 9, 1950..... 267

Notice filed August 11, 1950..... 268

Order of Court filed April 11, 1950..... 269

Certificate of Clerk..... 269

2 P L E A S had at a regular term of the United States District Court for the Eastern Division of the Northern District of Illinois begun and held in the United States Court Rooms in the City of Chicago in the Division and District aforesaid on the first Monday of April (it being the 3rd day thereof) in the Year of Our Lord One Thousand Nine Hundred Fifty and of the Independence of the United States of America, the 174th Year

Present: Honorable John P. Barnes, District Judge
Honorable Philip L. Sullivan, District Judge
Honorable Michael L. Igoe, District Judge
Honorable William J. Campbell, District Judge
Honorable Walter J. La Buy, District Judge
Honorable Elwyn R. Shaw, District Judge
Honorable William H. Holly, District Judge

Roy H. Johnson, Clerk
Thomas P. O'Donovan, Marshal

Wednesday, April 26, 1950

Court met pursuant to adjournment

Present: Honorable Michael L. Igoe, Trial Judge

3 P L E A S had at a regular term of the United States District Court for the Eastern Division of the Northern District of Illinois begun and held in the United States Court Rooms in the City of Chicago in the Division and District aforesaid on the first Monday of June (it being the 5th day thereof) in the Year of Our Lord One Thousand Nine Hundred Fifty and of the Independence of the United States of America, the 174th Year

Present: Honorable John P. Barnes, District Judge
Honorable Philip L. Sullivan, District Judge
Honorable Michael L. Igoe, District Judge
Honorable Walter J. La Buy, District Judge
Honorable William J. Campbell, District Judge
Honorable Elwyn R. Shaw, District Judge
Honorable William H. Holly, District Judge

Roy H. Johnson, Clerk
Thomas P. O'Donovan, Marshal

Wednesday, June 28, 1950

Court met pursuant to adjournment

Present: Honorable Michael L. Igoe, Trial Judge

4

IN THE UNITED STATES DISTRICT COURT
• • (Caption—No. 49 C 481) • •

STATEMENT PURSUANT TO RULE 10 (b) OF THE RULES OF UNITED STATES COURT OF APPEALS 7TH CIRCUIT

1. *Caption of the cause*:

State of Illinois,
County of Cook—ss

IN THE UNITED STATES DISTRICT COURT
For The Northern District of Illinois
Eastern Division

ANNA DESPER, Administratrix of the Estate of THOMAS J. DESPER, JR., Deceased,
Plaintiff,
vs.
STARVED ROCK FERRY COMPANY, a corporation,
Defendant.
No. 49 C 481

2. *Time of commencement of suit*:
March 21, 1949.

3. *Names of the Parties*:
a. Anna Desper, Administratrix of the Estate of Thomas J. Desper, Jr., deceased, Plaintiff.
b. Starved Rock Ferry Company, a corporation, Defendant.

5 4. *Dates when pleadings were filed*:
a. Complaint filed March 21, 1949.
b. Answer filed April 8, 1949.
c. Motion for stay of proceedings filed January 16, 1950.
d. Motion for leave to file amended answer made February 23, 1950, and filed April 20, 1950.
e. Amended complaint filed April 24, 1950.
f. Answer to amended complaint filed April 25, 1950.
g. Reply to answer to amended complaint filed April 25, 1950.
h. Motion for judgment notwithstanding the verdict filed May 5, 1950.
i. Motion for a new trial filed May 5, 1950.

5. *Time trial was had*:
April 19, 1950.

6. *Name of judge presiding at the trial:*
Honorable Michael L. Igoe.
7. *Verdict of jury:*
We, the jury, find defendant guilty and assess the plaintiff's damages at $25,000.00.
8. *Date judgment was entered:*
April 26, 1950.
9. *Date appeal was taken:*
July 27, 1950.

Respectfully submitted,
Angerstein & Angerstein
Attorneys for Defendant-Appellant.

7

IN THE UNITED STATES DISTRICT COURT

* * (Caption—No. 49 C 481) * *

Be It Remembered, that on to-wit, the 21st day of March, 1949, the above-entitled action was commenced by the filing of the following Complaint, in the office of the Clerk of the United States District Court for the Northern District of Illinois, Eastern Division, in words and figures following, to-wit:

8

IN THE UNITED STATES DISTRICT COURT

* * (Caption—No. 49 C 481) * *

COMPLAINT

Plaintiff Anna Desper, Administratrix of the Estate of Thomas J. Desper, Jr., Deceased, says:

1. That the defendant, Starved Rock Ferry Company is an Illinois Corporation, having its principal place of business at Starved Rock Park, La Salle County, La Salle, Illinois, in the Northern District of the State of Illinois; that this action is brought pursuant to the provisions of a certain act of Congress known as the Merchant Marine Act.

2. On and prior to April 26, 1948, Thomas J. Desper, Jr., the decedent, was a seaman employed as a river boat pilot and deck hand by the Starved Rock Ferry Company, a corporation, which is hereby made a defendant hereto, which owned, operated and maintained various vessels, large and small, on the Illinois River, a navigable stream.

3. On the date aforesaid, a large loading vessel owned, operated and maintained by the defendant was afloat and moored in navigable waters of the Illinois River, and while so moored, the decedent in the due course of his employment aboard said vessel and at the order and direction of the defendants' vice principal was required to and did stand near and assist the defendants' vice-principal while the said vice-principal was engaged in preparing certain fire-extinguishers for use in and about the vessels of
9 the defendant.

4. While the decedent was so engaged, in the due course of his employment in obedience to and in compliance with the order and direction of defendant's vice-principal, the defendant, Starved Rock Ferry Company:

(a) Carelessly and negligently failed to supply and maintain a seaworthy vessel properly equipped in that it caused, suffered and permitted a dangerously defective fire extinguisher to be brought upon and remain upon said vessel.

(b) Carelessly and negligentiy and without proper precaution opened said fire extinguisher and explosively released the pressure contained therein.

(c) Carelessly and negligently failed to warn the decedent when it knew or in the exercise of ordinary care would have known that such an operation was extremely hazardous.

(d) Carelessly and negligently failed to exercise reasonable care to decedent with a safe place to work.

5. As a direct and proximate result of one or more of the negligent acts or omissions aforesaid, and in consequence thereof, the said fire extinguisher was caused to and did whirl, rocket and carom with great force and violence, and did strike, hit, and wound plaintiff's decedent, and he received injuries which resulted in and caused his death on April 26, 1948.

6. The Decedent left surviving him Anna Desper, his mother, Thomas Desper, his father, James Desper, his brother; John Allen, his step-brother; Catherine, his sister; all of whom are living with the exception of Thomas J. Desper, Sr. his father, and all have sustained pecuniary loss and damage as a result of decedent's death.

7. This action is brought within three years of the death of decedent, and plaintiff brings herewith her
10 letters of administration as evidence of her right to sue.

Plaintiff Anna Desper, Administratrix of the Estate of Thomas J. Desper, Jr., deceased, asked judgment for Fifty Thousand Dollars ($50,000.).

Joseph D. Ryan
Malone & Herbolsheimer
Attorneys for Plaintiff

Joseph D. Ryan
Malone and Herbolsheimer
100 North LaSalle St.
Franklin 5124

Plaintiff Hereby Demands A Trial By Jury.

11 And afterwards on, to wit, the 30th day of March, 1949 there was filed in the Clerk's office of said Court a certain Summons With Marshal's Return Endorsed Thereon, in words and figures following, to wit:

12

IN THE UNITED STATES DISTRICT COURT
(Caption—No. 49 C 481)

SUMMONS.

To the above named Defendant:

You are hereby summoned and required to serve upon
Joseph D. Ryan
Malone and Herbolsheimer
100 North La Salle St., Chicago, Illinois
plaintiff's attorneys, an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

Roy H. Johnson
Clerk of Court.
By Ruth M. Waller
Deputy Clerk.

(Seal) Seal of Court

11a RETURN ON SERVICE OF WRIT

I hereby certify and return, that on the day of 19 , I received the within summons

Served this writ together with copy of complaint on the within named Starved Rock Ferry Company, a corporation, by delivering copies thereof to George Claudinic Vice Pres an agent, of said corporation, this 22 day of March A.D. 1949.

The President of said Corporation not found in my district.

MARSHAL'S FEES

Travel 200 $12.00
Service 1 2.00
14.00

T. P. O'Donovan
United States Marshal.
By Peter Bianco
Deputy United States Marshal.

Subscribed and sworn to before me, a this day of 19
(Seal)

Date: Mar. 21, 1949

13 And afterwards on, to wit, the 8th day of April, 1949 came the Defendant by its attorneys and filed in the Clerk's office of said Court its certain Answer in words and figures following, to wit:

14 IN THE UNITED STATES DISTRICT COURT
(Caption—No. 49 C 481)

ANSWER

The defendant, by Angerstein & Angerstein and Charles T. Shanner, its attorneys, answering the complaint of the plaintiff says:

1. Denies that at any time during the year 1948, Thomas J. Desper, Jr., was employed by the defendant as a seaman, as a river boat pilot, or as a deck hand as is alleged in paragraph 2 of the complaint. Admits that the defendant owned, operated and maintained various small sight seeing launches on the Illinois River, a navigable stream, during the summer months of the year, May, June, July, August, and September, but denies that it either owned, operated or maintained any large vessels on the Illinois River, or on any navigable stream on the day alleged in the complaint.

2. Denies that on April 26, 1948, the instrumentality referred to in paragraph 3 of plaintiff's complaint was a vessel; denies that it was afloat and denies that the said instrumentality was in navigable water of the Illinois River. Denies that plaintiff's intestate was in the course of his employment on any vessel owned, operated,
15 or maintained by the defendant, and denies that he was required to stand near to or to assist the defendant's vice principal while the latter was engaged in the operation described in paragraph 3 of the complaint.

3. Denies all of the allegations contained in paragraph 4 of the complaint and those contained in each and every sub-paragraph of the said paragraph 4

4. Denies that the action of the fire extinguisher described in paragraph 5 of the complaint was caused by any negligence or wrongful conduct or wrongful omission on the part of the defendant.

5. Has no knowledge of the truth or falsity of the matters alleged in paragraph 6 of the complaint so demands strict proof thereof.

6. Alleges that the injuries to plaintiff's intestate and his subsequent death resulted solely from his own negligence at the time and place alleged in the plaintiff's complaint.

7. Alleges that prior to the time alleged in plaintiff's complaint, defendant had elected to conduct and operate its business and employment under and pursuant to the terms and provisions of the Workmen's Compensation Act of Illinois; that said election was in full force and effect on the 26th day of April, 1948; that on said day defendant and plaintiff's intestate were operating and conducting their business and employment under and subject to all of the terms and provisions of the said Workmen's Compensation Act of Illinois (Ill. Rev. Stat. 1947, Chap. 48, sec 138 *et seq.*); that the injuries sustained by the plaintiff's intestate and his resultant death were accidental and arose out of and in the course and scope of his employment by the defendant and that by virtue of section 6 of the said Workmen's Compensation Act of Illinois the plaintiff is barred from maintaining this action but must pursue her remedy, if any she has, under the provisions of the said Workmen's Compensation Act of Illinois.

8. Denies that plaintiff is entitled to judgment in the sum of $50,000.00 or in any other sum.

Angerstein & Angerstein
Charles T. Shanner
Attorneys for Defendant

Angerstein & Angerstein
Charles T. Shanner
135 South La Salle Street
Chicago, Illinois
STate 2-0588

Received a copy of the foregoing answer this 8th day of April, 1949.

Joseph D. Ryan and
Malone & Herbolsheimer
Attorneys for Plaintiff

17 And afterwards on, to wit, the 16th day of January, 1950 came the Defendant by its attorneys and filed in the Clerk's office of said Court its certain Motion For Stay Of Proceedings in words and figures following, to wit:

18

IN THE UNITED STATES DISTRICT COURT

• • (Caption—No. 49 C 481) • •

MOTION FOR STAY OF PROCEEDINGS

Comes now Starved Rock Ferry Company, a corporation, the named defendant in the above-entitled cause and hereinafter referred to as defendant, by its attorneys, Angerstein & Angerstein and Charles T. Shanner, and moves this Honorable Court that further proceedings in the above-entitled cause be stayed in this court until the conclusion of another action now pending before the Industrial Commission of the State of Illinois between the same parties as in the instant action and for the same cause as that set forth in the complaint herein, and in support of such motion represents as follows:

(1) Thomas J. Desper, Jr., for whose death the present action was brought, was killed near Ottawa, Illinois, April 26, 1948, while in the employment of the defendant.

(2) Defendant now and always has been ready to pay the dependents of the said Thomas J. Desper, Jr., deceased, compensation under the Workmen's Compensation Act of Illinois as provided by such Act.

(3) On January 6, 1949, the defendant filed an application for adjustment of claim at the Industrial Commission to have the rights of the parties determined; such ap-

19 plication being given Commission No. 420756. (In *National Zinc Co.* v. *Industrial Com.*, 292 Ill. 598, the court said at page 600:

"Either an administrator, a beneficiary or an employer may file a petition for the adjustment of a claim for compensation. (*Hammond Co.* v. *Industrial Com.*, 288 Ill. 262; *Mississippi River Power Co.* v. *Industrial Com.*, 289 Ill. 353.)")

(4) On March 21, 1949, the named plaintiff in the instant suit—Anna Desper, mother of the said Thomas J. Desper, Jr., deceased, as administratrix of his estate filed the instant suit in this court.

(5) On March 28, 1949, the same Anna Desper, mother of the said deceased Thomas J. Desper, Jr., for herself and as mother and next friend of Catherine Desper, minor sister of the deceased Thomas J. Desper, Jr., filed an application for adjustment of claim with the Industrial Commission of the State of Illinois, said application being given Industrial Commission No. 420756.

(6) The application for adjustment of claim filed with the Industrial Commission of the State of Illinois by the said Anna Desper, mother of the deceased Thomas J. Desper, Jr., for herself and as mother and next friend of the said Catherine Desper, minor sister of the deceased Thomas J. Desper, Jr., made claim for compensation against the defendant under the terms and provisions of the Workmens' Compensation Act of Illinois and the said application for adjustment of claim among other things alleged as follows:

> "2. That a dispute has arisen with respect to the compensation to be paid for the disability resulting from such injury, and the general nature of the dispute is:
>
> "(b) A dispute exists concerning the amount and duration of the compensation payable, and whether any compensation is payable under the Workmen's Compensation Act."

The said application for adjustment of claim as filed with the Industrial Commission of the State of Illinois bore the written signatures "Anna M. Desper, Catherine Desper By Anna M. Desper, Her Mother and Next Friend" and also the written signatures of "Joseph D. Ryan, Malone & Herbolsheimer" attorneys for the said Anna M. Desper and Catherine Desper, mother and minor sister, respectively, of the said Thomas J. Desper, Jr., deceased.

A true and correct copy of the said application for adjustment of claim is attached hereto and incorporated herewith as Exhibit "A".

(7) On July 28, 1949, after due notice to the parties' attorneys, a hearing was had at the city hall in La Salle, Illinois, before Mr. Thomas M. Garman, the arbitrator designated by the Industrial Commission, on the application for adjustment of claim filed with the Industrial Commission March 28, 1949, by Anna Desper, mother of the said deceased Thomas J. Desper, Jr., on behalf of herself

and as mother and next friend of Catherine Desper, minor sister of the deceased Thomas J. Desper, Jr., and on the application for adjustment of claim filed by the defendant with the Industrial Commission January 6, 1949.

(8) At the hearing in the city hall at La Salle, Illinois, before Arbitrator Garman July 28, 1949, on the said applications for adjustment of claim the parties were represented by counsel and Anna M. Desper, mother of the deceased Thomas J. Desper, Jr., was present and testified as did other witnesses concerning the issues presented in the case.

(9) After consideration of the evidence and after submission to him of a memorandum of authorities by the defendant, the said Arbitrator Garman entered and filed
21 with the Industrial Commission a decision finding among other things as follows:

"That the deceased Thomas Joseph Desper and the Starved Rock Ferry Co. were on the 26th day of April, 1948, operating under the provisions of the Illinois Workmen's Compensation Act; that on the date last above mentioned said decedent sustained accidental injuries which did arise out of and in the course of the employment; and that notice of said accident was given said Starved Rock Ferry Co. and claim for compensation on account thereof was made on said Starved Rock Ferry Co. within the time required under the provisions of said Act."

And also:

"That Anna Desper, mother of Thomas Joseph Desper, deceased, is entitled to have and receive from said Starved Rock Ferry Co., the sum of $19.50 per week for a period of 266 weeks, and one week at $13.00, as provided in paragraph (b) of Section 7 of said Act, as amended, for the reason that the injuries sustained caused the death of Thomas Joseph Desper, on the 26th day of April, 1948, leaving him surviving Anna Desper, his mother, who was totally dependent upon the earnings of said decedent for her support. That this award and each of the installments thereof shall be paid to the mother of said decedent for her sole use and benefit, until the further order of the Industrial Commission, as provided in Section 21 of said Act, as amended.

"The Arbitrator further finds that decedent also left him surviving at the time of his death, Thomas Desper, Sr., his father, who departed this life on, to wit, the 1st day of February, 1949, and a minor dependent sister, Catherine J. Desper.

"That no compensation has been paid on account of said injury and resultant death.

"That said Anna Desper, mother of Thomas Joseph Desper, deceased, is now entitled to have and receive from Starved Rock Ferry Co. the sum of $1638.00 being the amount of compensation that has accrued from the 26th day of April, 1948, to the 6th day of December, 1949, the remainder of said award to be paid to said mother by said Starved Rock Ferry Co. in weekly payments, commencing one week from the date last above mentioned."

(10) A true and correct copy of Arbitrator Garman's aforesaid decision is attached hereto and incorporated herewith as Exhibit "B."

22 (11) A copy of the said Arbitrator Garman's decision was mailed to and on December 10, 1949, was received by the attorneys for Anna M. Desper, mother of the deceased Thomas J. Desper, Jr.

(12) On December 14, 1949, there was sent to Malone & Herbolsheimer at La Salle, Illinois, attorneys for the said Anna M. Desper, by registered mail by the Aetna Casualty & Surety Company on behalf of the defendant a letter with enclosed draft drawn payable to Anna M. Desper, mother of the said Thomas J. Desper, Jr., deceased, in the amount of $1,716 covering accrued compensation payments, in accordance with the terms of the aforesaid award entered by Arbitrator Garman, together with tender of future payment of $3,484—the balance of such award—either in installments or in a lump sum with approval of the Industrial Commission, the method of payment to be made in compliance with the wishes of the said Anna M. Desper.

(13) A copy of the aforesaid letter of December 14, 1949, from the Aetna Casualty & Surety Company on behalf of the defendant to Attorneys Malone & Herbolsheimer is attached hereto and incorporated herewith as Exhibit "C."

(14) On December 19, 1949, a letter was received by The Aetna Casualty and Surety Company from Malone &

Herbolsheimer, attorneys for Anna M. Desper, mother of Thomas J. Desper, Jr., deceased, in answer to the aforesaid letter of the Aetna Casualty & Surety Company and with Attorneys Malone & Herbolsheimer's letter there was returned the above-mentioned draft which had been drawn payable to Anna M. Desper, mother of Thomas J. Desper, Jr., deceased, in the amount of $1,716 and in such letter among other things it was stated as follows:

23 "We are returning herewith the above mentioned draft by registered mail for the reason that the issuance thereof, in our opinion, was somewhat premature, especially since the award of the Arbitrator had not become final in the case.

"For your information, we contemplate filing a petition to review the award of the Arbitrator and feel rather certain that when the matter reaches either the Industrial Commission as a whole or the Circuit Court, a finding will be handed down that the Industrial Commission had no jurisdiction whatsoever in the matter.

"We regret our attitude in this matter, but under the circumstances we have no alternative but return your draft pending final disposition of this case."

(15) A true and correct copy of the aforesaid letter from Malone & Herbolsheimer to The Aetna Casualty & Surety Company is attached hereto and incorporated as Exhibit "D."

(16) On December 16, 1949, there was filed with the Industrial Commission on behalf of the said Anna M. Desper a petition for review of Arbitrator Garman's award. In such petition for review it is alleged among other things as follows:

"Your petitioner further represents that said decision of the arbitrator should be reviewed by the Industrial Commission, for the following reasons, to-wit:

"1. That the Industrial Commission of Illinois was and is without jurisdiction to decide the issues presented by the facts of this cause.

"2. That the arbitrator was and is without jurisdiction to decide the issues presented by the facts of this cause."

The petition for review filed on behalf of Anna M. Desper by her Attorney Joseph D. Ryan also contained the following prayer:

"Your petitioner therefore prays that proper notice

in accordance with the statute may be given to the parties interested herein and that a date may be set by the Honorable Industrial Commission for a hearing upon this petition for review; and that upon such hearing said Commission may modify or vacate the
24 order and decision of the arbitrator, as in the opinion of said Commission the facts and circumstances shall warrant.

"And your petitioner will every pray."

(17) A true and correct copy of the petition for review filed with the Industrial Commission on behalf of Anna M. Desper by her attorney, Joseph D. Ryan, is attached hereto and incorporated herewith as Exhibit "E."

(18) As shown by the foregoing, the plaintiff in the instant suit invoked the jurisdiction of the Industrial Commission of the State of Illinois by filing an application for adjustment of claim making claim against the defendant for compensation under the provisions of the Workmen's Compensation Act.

(19) The parties to the instant suit have appeared before and have submitted to the jurisdiction of the Industrial Commission of Illinois.

(20) There has been a hearing on the plaintiff's application for adjustment of claim before an arbitrator designated by the Industrial Commission and an award has been entered by the arbitrator.

(21) The plaintiff has appealed from the decision of the arbitrator.

(22) The hearing before the arbitrator was held in the vicinity where the accident causing the death of the said Thomas J. Desper, Jr., occurred and in the very near future the Industrial Commission in accordance with plaintiff's petition for review of the arbitrator's decision, will set the case for hearing on review in the same vicinity where the accident occurred and at such hearing on review the parties, with a minimum of expense, inconvenience and delay can have witnesses who are familiar with the circumstances of the accident and the attendant physical sur-
25 roundings appear and testify.

(23) At the hearing on review before the Industrial Commission the hearing commissioner then being in the vicinity where the accident occurred may in accordance with practice before the Industrial Commission, if the hearing commissioner so desires, make a personal inspection of the premises where the accident occurred.

(24) The Industrial Commission and the courts of the State of Illinois have the power and jurisdiction to determine as a matter of law whether under all the circumstances the death of the said Thomas J. Desper, Jr., comes within the scope and purview of the Workmen's Compensation Act of Illinois or within the scope and purview of admiralty law, which question is determinative in both the instant suit and in the proceedings now pending before the Industrial Commission on plaintiff's petition for review.

(25) As provided by the legislature of the State of Illinois, the procedure in litigated cases before the Industrial Commission is prompt and summary and if either party is dissatisfied with the decision of the Industrial Commission on review, the statute provides an appeal to the circuit court by writ of certiorari must be taken within twenty days and later if either party is dissatisfied with the judgment of the circuit court a petition for writ of error to the Supreme Court of Illinois must be prepared and filed within sixty days. The appellate procedural steps are provided within the Workmen's Compensation Act itself and the statutory period within which appeals may be taken are jurisdictional and cannot be delayed or extended even by order of a reviewing court.

26 Wherefore by reason of the foregoing the defendant respectfully prays that this Honorable Court order a stay of further proceedings in the instant case until final determination of the jurisdictional question is had under the appropriate provisions of the Workmen's Compensation Act of Illinois.

Respectfully, submitted
Angerstein & Angerstein
Charles T. Shanner,
Attorneys for Starved Rock Ferry Company, a corporation, defendant.

EXHIBIT "A"

27 Form 10A (FATAL CASES)

STATE OF ILLINOIS
DWIGHT H. GREEN, Governor
INDUSTRIAL COMMISSION
205 W. Wacker Drive, Chicago, Ill.

APPLICATION FOR ADJUSTMENT OF CLAIM

Notice of Disputed Claim and Memorandum of Names and Addresses
(this form to be filed in triplicate)

Anna M. Desper, mother of Thomas J. Desper, Deceased; and Catherine J. Desper, a minor dependent sister of Thomas J. Desper, Deceased, by Anna M. Desper, her mother and next friend,
Petitioners,

vs.

Starved Rock Ferry Company, a corporation; and The Aetna Casualty and Surety Company,
Respondents.

No. 420756

The petition of the undersigned respectfully shows to this Honorable Commission the following, to-wit:

1. That on the 26th day of April, 1948, Thomas J. Desper received an injury by reason of an accident arising out of and in the course of his employment by the above named Starved Rock Ferry Company which injury resulted in the death of said employee on, to-wit, the 26th day of April, 1948; that your petitioner is the mother and the sister of said deceased.

2. That a dispute has arisen with respect to the compensation to be paid for the disability resulting from such injury, and the general nature of the dispute is:

(b.) A dispute exists concerning the amount and duration of the compensation payable, and whether any compensation is payable under the Workmen's Compensation Act.

3. The following particulars relative to this application are herewith given:

(a) Name of injured employee Thomas J. Desper
Address R.F.D. #1, La Salle, Illinois
Age at time of injury 21 years.

28 (b) Name of employer Starved Rock Ferry Company
Place of business and address P. O. Box 95, Starved Rock State Park, La Salle, Illinois

(c) Place of accident Buffalo Rock State Park boat landing near Ottawa, Illinois.

(d) Nature of work upon which injured was engaged at time of accident and how caused Was working on fire extinguisher which exploded and killed him instantly.

(e) State whether medical, surgical and hospital treatment were furnished by employer and, if so, to what extent; amount expended for above purposes and period treated. None; death instantaneous.

(f) Earnings of employee during year preceding injury, if employed by the same employer; if not so employed, give earnings of such employees in the same class or grade. $1,920.00

(g) Compensation payments received from employer:
$ N , account medical care and attendance.
$ O per week for .....weeks' temporary total disability
$ N per week for ..... weeks' partial disability.
$ E account of other items, here enumerated:

5. (a) Date of service on employer of notice of accident April 26, 1948.

(b) If notice not served within thirty days, did any agent of employer have knowledge of the facts and circumstances of the accident? — —

6. The deceased left him surviving:

(a) A widow:
Name - - - Address
whom he was under legal obligation to support.

(b) Parent or parents totally dependent upon the earnings of deceased at the time of the injury:
Name Anna M. Desper Address R.F.D. #1, LaSalle, Illinois

Name Thomas Desper (died Feb. 1, 1949)
Address R.F.D. #1, La Salle, Illinois

(d) Collateral heirs dependent upon the deceased at the time of the injury and the average annual contributions during the two years preceding the injury resulting in death:

29 Name Catherine J. Desper Address R.F.D. #1, La Salle, Illinois Contribution to be determined

7. Your petitioner prays that the Industrial Commission appoint an arbitrator to make such inquiries and investigations as he shall deem necessary, and that a day be appointed by said Industrial Commission and the time and place thereof fixed, where said arbitrator may hear such proper evidence as the parties hereto may submit, and that an award and decision may be made, in conformity with the statute in such case made and provided.

The undersigned request that all notices of proceedings in the above entitled matter be served personally or by registered mail upon the party whose name and address follows as attorney for petitioner; if no attorney's name appears, then to the name and address of the undersigned.

Dated this 26th day of March 1949

(Signed) s/ Anna M. Desper
s/ Catherine J. Desper
By Anna M. Desper
Her Mother and Next Friend

s/ Joseph D. Ryan
Attorney for Petitioners

s/ Malone & Herbolsheimer
Address Joseph D. Ryan, Suite 2007, 100 N. La Salle St. Chicago 2, Ill.
Telephone FRanklin 5124
Malone and Herbolsheimer, State Bank Building, La Salle, Ill.
Telephone—La Salle, Ill.

30 EXHIBIT "B".

State of Illinois,
County of LaSalle—ss.

BEFORE THE INDUSTRIAL COMMISSION
OF ILLINOIS.

Anna M. Desper, mother of Thomas J. Desper, deceased, and Catherine J. Desper, a minor dependent sister of Thomas J. Desper, deceased, by Anna M. Desper, her mother and next friend

Petitioners

vs.

Starved Rock Ferry Company, a corporation; and the Aetna Casualty and Surety Company

Respondents

No. 420756

Starved Rock Ferry Company

Petitioner

vs.

Thomas Desper, Sr., father, Anna M. Desper, mother, James Desper, brother, and Kathryn Desper, sister of Thomas Joseph Desper, deceased

DECISION OF ARBITRATOR.

Notice and applications for adjustment of claim having been filed in the above entitled matter, and Tom M. Garman having been designated by said Commission as arbitrator thereof, and said matter having come on to be heard before said Arbitrator at City Hall in the City of La Salle said County and State, on the 28th day of July, 1949; and, after hearing the proofs and allegations of the parties hereto, and having made careful inquiry and investigation of said matter and being fully advised in the premises, said Arbitrator finds:

That the deceased Thomas Joseph Desper and the Starved Rock Ferry Co. were on the 26th day of April, 1948, operating under the provisions of the Illinois Workmen's Compensation Act; that on the date last above mentioned said decedent sustained accidental injuries which did arise out of and in the course of the employment; and that notice of said accident was given said Starved Rock Ferry Co.

and claim for compensation on account thereof was made on said Starved Rock Ferry Co. within the time required under the provisions of said Act.

That the earnings of the decedent during the year next preceding the injury were $1920.00, and that the average weekly wage was $36.92.

31 That decedent at time of injury was 21 years of age and had no children under 16 years of age.

That necessary first aid, medical, surgical and hospital services have been provided by the respondent herein.

That Anna Desper, mother of Thomas Joseph Desper, deceased, is entitled to have and receive from said Starved Rock Ferry Co., the sum of $19.50 per week for a period of 266 weeks, and one week at $13.00, as provided in paragraph (b) of Section 7 of said Act, as amended, for the reason that the injuries sustained caused the death of Thomas Joseph Desper, on the 26th day of April, 1948, leaving him surviving Anna Desper, his mother, who was totally dependent upon the earnings of said decedent for her support. That this award and each of the installments thereof shall be paid to the mother of said decedent for her sole use and benefit, until the further order of the Industrial Commission, as provided in Section 21 of said Act, as amended.

The Arbitrator further finds that decedent also left him surviving at the time of his death, Thomas Desper, Sr., his father, who departed this life on, to wit, the 1st day of February, 1949, and a minor dependent sister, Catherine J. Desper.

That no compensation has been paid on account of said injury and resultant death.

That said Anna Desper, mother of Thomas Joseph Desper, deceased, is now entitled to have and receive from Starved Rock Ferry Co. the sum of $1638.00 being the amount of compensation that has accrued from the 26th day of April, 1948, to the 6th day of December, 1949, the remainder of said award to be paid to said mother by said Starved Rock Ferry Co. in weekly payments, commencing one week from the date last above mentioned.

Dated and Entered this 9th day of December, 1949.

Tom M. Garman,
Arbitrator.

EC

32 EXHIBIT "C".

Dec 15, 1949, Angerstein & Angerstein
Registered Mail December 14, 1949
Return Receipt Requested
Malone and Herbolsheimer
State Bank Building
LaSalle, Illinois
Attention: Mr. Herbolsheimer

Re: 8 CC 33615—Starved Rock Ferry Company—Thomas Joseph Desper, Deceased—Anna M. Desper, Mother

Gentlemen:

Our attorneys have favored us with a copy of the award as rendered by the Industrial Commission of Illinois on December 9, 1949, and pursuant to the order of the Commission, we are enclosing our draft in payment of the accrued compensation.

The enclosed check is in the amount of $1,716.00 payable to Anna M. Desper, Mother of Thomas Joseph Desper, Deceased. It covers 88 weeks of compensation at the rate of $19.50 per week for the period from April 27, 1948 to January 2, 1950.

Will you kindly ask your client if she desires that the future payments which are to be made at the rate of $19.50 per week, be made on a monthly basis, and we would also appreciate being advised as to whether or not you desire these checks to be forwarded direct to your office or whether they should be sent direct to your client, Anna M. Desper. The balance of compensation involved over and above the $1,716.00 represented by the enclosed check is $3,484.00, which we shall be glad to pay on whatever basis your client prefers.

Incidentally, if Mrs. Desper desires a lump sum payment, we are willing to cooperate in every way possible to get the Industrial Commission to approve a lump sum settlement for the balance due her. We would appreciate an expression from you at an early date in reply to the questions contained herein so that we may be able to comply with the wishes of your client.

Yours very truly,
JAB/sc The Aetna Casualty & Surety Company
Enclosure By [s] John A. Bachl

cc: Mrs. Anna M. Desper
Mr. Charles W. Helmig

33

EXHIBIT "D".

MALONE AND HERBOLSHEIMER

State Bank Building
La Salle, Illinois

Chicago Claims Dept.
December 16, 1949

The Aetna Casualty and Surety Company
Claim Department
Suite 1515
120 S. LaSalle Street
Chicago 3, Illinois
Attention: Mr. John A. Bachl
Gentlemen:

Re: 8 CC 33615—Starved Rock Ferry Company—Thomas Joseph Desper, Deceased—Anna M. Desper, Mother

We acknowledge receipt of your communication of December 14 in which you enclosed your draft #11D-02725 payable to Anna M. Desper, mother of Thomas Desper, in the sum of $1,716.00, being a partial payment on death benefits per Illinois Industrial Commission Award—88 weeks @ $19.50 per week, period of from 4/27/48 th ough 1-2-50, both inclusive.

We are returning herewith the above mentioned draft by registered mail for the reason that the issuance thereof, in our opinion, was somewhat premature, especially since the award of the Arbitrator had not become final in the case.

For your information, we contemplate filing a petition to review the award of the Arbitrator and feel rather certain that when the matter reaches either the Industrial Commission as a whole or the Circuit Court, a finding will be handed down that the Industrial Commission had no jurisdiction whatsoever in the matter.

We regret our attitude in this matter, but under the circumstances we have no alternative but return your draft pending final disposition of this case.

Very truly yours,
Malone and Herbolsheimer
By [s] George L. Herbolsheimer

GLH:MJD (Registered)
ENC. 1

34 EXHIBIT "E".

Received Dec. 19, 1949, Angerstein & Angerstein

STATE OF ILLINOIS
INDUSTRIAL COMMISSION

160 N. La Salle Street
Chicago 1, Ill.

Anna M. Desper, mother of Thomas J. Desper, deceased, and Catherine J. Desper, a minor dependent sister of Thomas J. Desper, deceased, by Anna M. Desper, her mother and next friend,

Petitioners

vs.

Starved Rock Ferry Company, a corporation; and the Aetna Casualty and Surety Company,

Respondents

No. 420756

Starved Rock Ferry Company,

Petitioner

vs.

Thomas Desper, Sr., father, Anna M. Desper, mother, James Desper, brother, and Kathryn Desper, sister of Thomas Joseph Desper, deceased,

Respondents

PETITION FOR REVIEW OF DECISION OF ARBITRATOR.

Now comes Anna Desper, et al of La Salle, Illinois, and respectfully petitions the Honorable Industrial Commission of the State of Illinois as follows:

That said commission shall review the decision of the arbitrator, duly appointed according to law, in the above entitled cause, which decision of said arbitrator was filed with the Industrial Commission on the 9th day of December, 1949.

Your petitioner represents that an agreed statement of facts or correct transcript of evidence of the proceedings before said arbitrator will be filed by your petitioner as required by law.

Your petitioner further represents that said decision of

the arbitrator should be reviewed by the Industrial
35 Commission, for the following reasons, to-wit:

1. That the Industrial Commission of Illinois was and is without jurisdiction to decide the issues presented by the facts of this cause.

2. That the arbitrator was and is without jurisdiction to decide the issues presented by the facts of this cause.

3. That the arbitrator erred in admitting over the objection of this petitioner improper and incompetent evidence offered by the respondents.

4. That the decision of the arbitrator is contrary to the evidence.

5. That the decision of the arbitrator is contrary to the law.

6. That the decision of the arbitrator is contrary to the law and the evidence.

7. That the decision of the arbitrator is against the clear preponderance of the evidence.

8. That the decision of the arbitrator is against the manifest weight of the evidence.

Your petitioner therefore prays that proper notice in accordance with the statute may be given to the parties interested herein and that a date may be set by the Honorable Industrial Commission for a hearing upon this petition for review, and that upon such hearing said Commission may modify or vacate the order and decision of the arbitrator, as in the opinion of said Commission the facts and circumstances shall warrant.

And your petitioner will ever pray.

Anna Desper
By: [s] Joseph D. Ryan
Her Attorney

Joseph D. Ryan
100 N. La Salle St., 2007
Chicago 2, Ill.
FRanklin 2-5124
Attorney for petitioner

36 And afterwards, to wit, on the 7th day of February, 1950, being one of the days of the regular February term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Michael L. Igoe, District Judge, appears the following entry, to wit:

37

IN THE UNITED STATES DISTRICT COURT

* * (Caption—No. 49 C 481) * *

This cause having been heretofore taken under advisement on the motion of the defendant to stay the proceedings herein after due consideration of the briefs of counsel and other papers filed herein and the Court being now fully advised in the premises it is

Ordered that said motion to stay proceedings be and it is hereby overruled and that this cause be and it is hereby set for trial on February 23, 1950.

38 And afterwards, to wit, on the 19th day of April, 1950, being one of the days of the regular April term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Michael L. Igoe, District Judge, appears the following entry, to wit:

39

IN THE UNITED STATES DISTRICT COURT

* * (Caption—No. 49 C 481) * *

This cause this day being called for trial come the parties to this suit by their attorneys, respectively, and the defendant by counsel enters its motion for leave to file an amended answer which motion is overruled and the issues being joined it is

Ordered that a Jury come whereupon come a Jury of twelve (12) good and lawful men and women to-wit:

Mrs. Johanna L. Podlesak	Mrs. Minnie F. Berndt
Mrs. Ruth P. Ingram	Reba M. Washington, Jr.
Mrs. Alice C. Ellenberg	Clarence Reese, Jr.
Raymond M. Reimisch	Mrs. Mildred Hayes
Mrs. Mayfred L. Lewy	Mrs. Etta Holz.
Mrs. Ruth A. Williams	Mrs. Winifred E. Jones

who are duly selected and empaneled and sworn well and

truly to try the issues joined herein and a true verdict to render according to law and the evidence and the hour of adjournment having arrived it is

Ordered that the Jury be and they are hereby permitted to separate until April 20, 1950.

40 And afterwards on, to wit, the 20th day of April, 1950 came the Defendant by its attorneys and filed in the Clerk's office of said Court its certain Motion, Proposed Amended Answer, and Exhibits Attached thereto in words and figures following, to wit:—

41

IN THE UNITED STATES DISTRICT COURT

* * (Caption—No. 49 C 481) * *

MOTION

Comes now the defendant by Angerstein & Angerstein and Charles T. Shanner, its attorneys, and moves for leave of court to file instanter its amended answer to the complaint of the plaintiff and attaches to this motion the said proposed amended answer.

Angerstein & Angerstein
Charles T. Shanner

42

IN THE UNITED STATES DISTRICT COURT

* * (Caption—No. 49 C 481) * *

AMENDED ANSWER

The defendant, by Angerstein & Angerstein and Charles T. Shanner, its attorneys, leave of court being first duly had and obtained, files its amended answer to the complaint of the plaintiff and says:

1. Denies that at any time during the year 1948, Thomas J. Desper, Jr. was employed by the defendant as a seaman, as a river boat pilot, or as a deck hand as is alleged in paragraph 2 of the complaint. Admits that the defendant owned, operated and maintained various small sight seeing launches on the Illinois River, a navigable stream, during the summer months of the year, May, June, July, August and September, but denies that it either owned,

operated or maintained any large vessels on the Illinois River, or on any navigable stream on the day alleged in the complaint.

2. Denies that on April 26, 1948 the instrumentality referred to in paragraph 3 of plaintiff's complaint was a vessel; denies that it was afloat and denies that the said instrumentality was in navigable water of the Illinois River. Denies that plaintiff's intestate was in the course of his employment on any vessel owned, operated,
43 or maintained by the defendant, and denies that he was required to stand near to or to assist the defendant's vice principal while the latter was engaged in the operation described in paragraph 3 of the complaint.

3. Denies all of the allegations contained in paragraph 4 of the complaint and those contained in each and every sub-paragraph of the said paragraph 4.

4. Denies that the action of the fire extinguisher described in paragraph 5 of the complaint was caused by any negligence or wrongful conduct or wrongful omission on the part of the defendant.

5. Has no knowledge of the truth or falsity of the matters alleged in paragraph 6 of the complaint so demands strict proof thereof.

6. Alleges that the injuries to plaintiff's intestate and his subsequent death resulted solely from his own negligence at the time and place alleged in the plaintiff's complaint.

7. Alleges that prior to the time alleged in plaintiff's complaint, defendant had elected to conduct and operate its business and employment under and pursuant to the terms and provisions of the Workmen's Compensation Act of Illinois; that said election was in full force and effect on the 26th day of April, 1948; that on said day defendant and plaintiff's intestate were operating and conducting their business and employment under and subject to all of the terms and provisions of the said Workmen's Compensation Act of Illinois (Ill. Rev. Stat. 1947, Chap. 48, sec. 138 et seq.); that the injuries sustained by the plaintiff's intestate and his resultant death were
44 accidental and arose out of and in the course and scope of his employment by the defendant and that by virtue of section 6 of the said Workmen's Compensation Act of Illinois the plaintiff is barred from maintaining this action but must pursue her remedy, if any she has, under the provisions of the said Workmen's Compensation Act of Illinois.

8. On January 6, 1949, the defendant filed an application for adjustment of claim at the Industrial Commission to have the rights of the parties determined; such application being given Commission No. 420756. (In *National Zinc Co.* v. *Industrial Com.*, 292 Ill. 598, the court said at page 600:

> "Either an administrator, a beneficiary or an employer may file a petition for the adjustment of a claim for compensation. (*Hammond Co.* v. *Industrial Com.*, 288 Ill. 262; *Mississippi River Power Co.* v. *Industrial Com.*, 289 Ill. 353.)")

9. On March 21, 1949, the named plaintiff in the instant suit—Anna Desper, mother of the said Thomas J. Desper, Jr., deceased, as administratrix of his estate filed the instant suit in this court.

10. On March 28, 1949, the same Anna Desper, mother of the said deceased Thomas J. Desper, Jr., for herself and as mother and next friend of Catherine Desper, minor sister of the deceased Thomas J. Desper, Jr., filed an application for adjustment of claim with the Industrial Commission of the State of Illinois, said application being given Industrial Commission No. 420756.

11. The application for adjustment of claim filed with the Industrial Commission of the State of Illinois by the said Anna Desper, mother of the deceased Thomas J. Desper, Jr., for herself and as mother and next friend of the said Catherine Desper, minor sister of the deceased Thomas J. Desper, Jr., made claim for compensation against the defendant under the terms and provisions of the Workmen's Compensation Act of Illinois and the said application for adjustment of claim among other things alleged as follows:

> "2. That a dispute has arisen with respect to the compensation to be paid for the disability resulting from such injury, and the general nature of the dispute is:
>
> "(b) A dispute exists concerning the amount and duration of the compensation payable, and whether any compensation is payable under the Workmen's Compensation Act."

The said application for adjustment of claim as filed with the Industrial Commission of the State of Illinois bore the written signatures "Anna M. Desper, Catherine Des-

per By Anna M. Desper, Her Mother and Next Friend" and also the written signatures of "Joseph D. Ryan, Malone & Herbolsheimer" attorneys for the said Anna M. Desper and Catherine Desper, mother and minor sister, respectively, of the said Thomas J. Desper, Jr., deceased.

A true and correct copy of the said application for adjustment of claim is attached hereto and incorporated herewith as Exhibit "A."

12. On July 28, 1949, after due notice to the parties' attorneys, a hearing was had at the city hall in La Salle, Illinois, before Mr. Thomas M. Garman, the arbitrator designated by the Industrial Commission, on the application for adjustment of claim filed with the Industrial Commission March 28, 1949, by Anna Desper, mother of
46 the said deceased Thomas J. Desper, Jr., on behalf of herself and as mother and next friend of Catherine Desper, minor sister of the deceased Thomas J. Desper, Jr., and on the application for adjustment of claim filed by the defendant with the Industrial Commission January 6, 1949.

13. At the hearing in the city hall at La Salle, Illinois, before Arbitrator Garman July 28, 1949, on the said applications for adjustment of claim the parties were represented by counsel and Anna M. Desper, mother of the deceased Thomas J. Desper, Jr., was present and testified as did other witnesses concerning the issues presented in the case.

14. After consideration of the evidence and after submission to him of a memorandum of authorities by the defendant, the said Arbitrator Garman entered and filed with the Industrial Commission a decision finding among other things as follows:

> "That the deceased Thomas Joseph Desper and the Starved Rock Ferry Co. were on the 26th day of April, 1948, operating under the provisions of the Illinois Workmen's Compensation Act; that on the date last above mentioned said decedent sustained accidental injuries which did arise out of and in the course of the employment; and that notice of said accident was given said Starved Rock Ferry Co. and claim for compensation on account thereof was made on said Starved Rock Ferry Co. within the time required under the provisions of said Act."

And also:

"That Anna Desper, mother of Thomas Joseph Desper, deceased, is entitled to have and receive from said Starved Rock Ferry Co. the sum of $19.50 per week for a period of 266 weeks, and one week at $13.00, as provided in paragraph (b) of Section 7 of said Act, as amended, for the reason that the injuries sustained caused the death of Thomas Joseph Desper, on the 26th day of April, 1948, leaving him surviving
47 Anna Desper, his mother, who was totally dependent upon the earnings of said decedent for her support. That this award and each of the installments thereof shall be paid to the mother of said decedent for her sole use and benefit, until the further order of the Industrial Commission, as provided in Section 21 of said Act, as amended.

"The Arbitrator further finds that decedent also left him surviving at the time of his death, Thomas Desper, Sr., his father, who departed this life on, to wit, the 1st day of February, 1949, and a minor dependent sister, Catherine J. Desper.

"That no compensation has been paid on account of said injury and resultant death.

"That said Anna Desper, mother of Thomas Joseph Desper, deceased, is now entitled to have and receive from Starved Rock Ferry Co. the sum of $1638.00 being the amount of compensation that has accrued from the 26th day of April, 1948, to the 6th day of December, 1949, the remainder of said award to be paid to said mother by said Starved Rock Ferry Co. in weekly payments, commencing one week from the date last above mentioned."

15. A true and correct copy of Arbitrator Garman's aforesaid decision is attached hereto and incorporated herewith as Exhibit "B."

16. A copy of the said Arbitrator Garman's decision was mailed to and on December 10, 1949, was received by the attorneys for Anna M. Desper, mother of the deceased Thomas J. Desper, Jr.

17. On December 14, 1949, there was sent to Malone & Herbolsheimer at La Salle, Illinois, attorneys for the said Anna M. Desper, by registered mail by the Aetna Casualty & Surety Company on behalf of the defendant a letter with enclosed draft drawn payable to Anna M.

Desper, mother of the said Thomas J. Desper, Jr., deceased, in the amount of $1,716 covering accrued compensation payments, in accordance with the terms of the aforesaid award entered by Arbitrator Garman, together with
48 tender of future payment of $3,484—the balance of such award—either in installments or in a lump sum with approval of the Industrial Commission, the method of payment to be made in compliance with the wishes of the said Anna M. Desper.

18. A copy of the aforesaid letter of December 14, 1949, from the Aetna Casualty & Surety Company on behalf of the defendant to Attorneys Malone & Herbolsheimer is attached hereto and incorporated herewith as Exhibit "C."

19. On December 19, 1949, a letter was received by The Aetna Casualty and Surety Company from Malone & Herbolsheimer, attorneys for Anna M. Desper, mother of Thomas J. Desper, Jr., deceased, in answer to the aforesaid letter of the Aetna Casualty & Surety Company and with Attorneys Malone & Herbolsheimer's letter there was returned the above-mentioned draft which had been drawn payable to Anna M. Desper, mother of Thomas J. Desper, Jr., deceased, in the amount of $1,716 and in such letter among other things it was stated as follows:

> "We are returning herewith the above mentioned draft by registered mail for the reason that the issuance thereof, in our opinion, was somewhat premature, especially since the award of the Arbitrator had not become final in the case.
>
> "For your information, we contemplate filing a petition to review the award of the Arbitrator and feel rather certain that when the matter reaches either the Industrial Commission as a whole or the Circuit Court, a finding will be handed down that the Industrial Commission had no jurisdiction whatsoever in the matter.
>
> "We regret our attitude in this matter, but under the circumstances we have no alternative but return your draft pending final disposition of this case."

20. A true and correct copy of the aforesaid letter from Malone & Herbolsheimer to The Aetna Casualty & Surety Company is attached hereto and incorporated as Exhibit "D."

49 21. On December 16, 1949, there was filed with

the Industrial Commission on behalf of the said Anna M. Desper a petition for review of Arbitrator Garman's award. In such petition for review it is alleged among other things as follows:

"Your petitioner further represents that said decision of the arbitrator should be reviewed by the Industrial Commission, for the following reasons, to-wit:

"1. That the Industrial Commission of Illinois was and is without jurisdiction to decide the issues presented by the facts of this cause."

"2. That the arbitrator was and is without jurisdiction to decide the issues presented by the facts of this cause."

The petition for review filed on behalf of Anna M. Desper by her Attorney Joseph D. Ryan also contained the following prayer:

"Your petitioner therefore prays that proper notice in accordance with the statute may be given to the parties interested herein and that a date may be set by the Honorable Industrial Commission for a hearing upon this petition for review, and that upon such hearing said Commission may modify or vacate the order and decision of the arbitrator, as in the opinion of said Commission the facts and circumstances shall warrant.

"And your petitioner will ever pray."

22. A true and correct copy of the petition for review filed with the Industrial Commission on behalf of Anna M. Desper by her attorney, Joseph D. Ryan, is attached hereto and incorporated herewith as Exhibit "E."

23. As shown by the foregoing, the plaintiff in the instant suit invoked the jurisdiction of the Industrial Commission of the State of Illinois by filing an application for adjustment of claim making claim against the defendant for compensation under the provisions of the Workmen's Compensation Act.

50 24. The parties to the instant suit have appeared before and have submitted to the jurisdiction of the Industrial Commission of Illinois.

25. There has been a hearing on the plaintiff's application for adjustment of claim before an arbitrator designated by the Industrial Commission and an award has been entered by the arbitrator.

26. The plaintiff has appealed from the decision of the arbitrator.

27. The hearing before the arbitrator was held in the vicinity where the accident causing the death of the said Thomas J. Desper, Jr., occurred and, in accordance with plaintiff's petition for review of the arbitrator's decision the case was heard on review on March 14, 1950, in the same vicinity where the accident occurred and with a minimum of expense, inconvenience and delay. Oral argument on said petition for review is set for April 21, 1950, at Chicago, Illinois.

28. The Industrial Commission and the courts of the State of Illinois have the power and jurisdiction to determine as a matter of law whether under all the circumstances the death of the said Thomas J. Desper, Jr., comes within the scope and purview of the Workmen's Compensation Act of Illinois or within the scope and purview of admiralty law, which question is determinative in both the instant suit and in the proceedings now pending before the Industrial Commission on plaintiff's petition for review.

29. As provided by the legislature of the State of Illinois, the procedure in litigated cases before the Industrial Commission is prompt and summary and if either party is dissatisfied with the decision of the Industrial
51 Commission on review, the statute provides an appeal to the circuit court by writ of certiorari must be taken within twenty days and later if either party is dissatisfied with the judgment of the circuit court a petition for writ of error to the Supreme Court of Illinois must be prepared and filed within sixty days. The appellate procedural steps are provided within the Workmen's Compensation Act itself and the statutory period within which appeals may be taken are jurisdictional and cannot be delayed or extended even by order of a reviewing court.

30. Denies that plaintiff is entitled to judgment in the sum of $50,000.00 or in any other sum.

Angerstein & Angerstein
Charles T. Shanner
Attorneys for Defendant

Angerstein & Angerstein
Charles T. Shanner
135 South La Salle Street
Chicago 3, Illinois
STate 2-0588

52

EXHIBIT "A"

State of Illinois
Adlai E. Stevenson, Governor
INDUSTRIAL COMMISSION
160 N. La Salle St., Chicago 1, Ill.

APPLICATION FOR ADJUSTMENT OF CLAIM

Notice Of Disputed Claim And Memorandum Of Names And Addresses

(This form to be filed in triplicate)

Anna M. Desper, mother of Thomas J. Desper, Deceased; and Catherine J. Desper, a minor dependent sister of Thomas J. Desper, Deceased, by Anna M. Desper, her mother and next friend
Petitioners,
vs.
Starved Rock Ferry Company, a corporation; and The Aetna Casualty And Surety Company,
Respondents.
No. 420756

The petition of the undersigned respectfully shows to this Honorable Commission the following, to-wit:

1. That on the 26th day of April, 1948 Thomas J. Desper received an injury by reason of an accident arising out of and in the course of his employment by the above named Starved Rock Ferry Company which injury resulted in the death of said employee to, to-wit, the 26th day of April 1948; that your petitioner is the mother and the sister of said deceased.

2. That a dispute has arisen with respect to the compensation to be paid for the disability resulting from such injury, and the general nature of the dispute is:

(b) A dispute exists concerning the amount and duration of the compensation payable and whether any compensation is payable under the Workmen's Compensation Act.

3. The following particulars relative to this application are herewith given:

(a) Name of injured employee Thomas J. Desper
Address R.F.D. #1, La Salle, Illinois
Age at time of injury 21 years.

(b) Name of employer Starved Rock Ferry Company
Place of business and address P.O. Box 95, Starved Rock State Park, La Salle, Illinois.

(c) Place of accident Buffalo Rock State Park boat landing near Ottawa, Illinois.

(d) Nature of work upon which injured was engaged at time of accident and how caused Was working on fire extinguisher which exploded and killed him instantly.

(e) State whether medical, surgical and hospital treatment were furnished by employer ..... and, if so, to what extent; amount expended for ..... above purposes and period treated.

None; death instantaneous.

(f) Earnings of employee during year preceding injury, if employed by the same employer; if not so employed, give earnings of such ..... employees in the same class or grade. $1,920.00

(g) Compensation payments received from employer:

$ N.....account medical care and attendance.
$ O.....per week for ..... weeks' temporary total disability.
$ N....per week for ..... weeks partial disability.
$ E..account of other items, here enumerated:

5. (a) Date of service on employer of notice of accident April 26, 1948.

(b) If notice not served within thirty days, did any agent of employer have knowledge of the facts and circumstances of the accident? .....

(Fill out only one of the following tables, indicating which paragraph of Section 7 compensation is claimed under).

6. The deceased left him surviving:

A widow:

Name ..... Address .....
Children (give names, addresses and ages):
Name ..... Address ..... Age .....
Name ..... Address ..... Age .....
Name ..... Address ..... Age .....
Name ..... Address ..... Age .....
Name ..... Address ..... Age .....
whom he was under legal obligation to support.

(b) Parent or parents totally dependent upon the earnings of deceased at time of injury:
Name Anna M. Desper Address R.F.D. #1, La Salle, Illinois
Thomas Desper (died Feb. 1, 1949) R.F.D. #1, LaSalle, Illinois

(c) Parent, grandparent or grandchild partially dependent upon the earnings of the deceased at the time of the injury and the respective dependencies:
Name ..... Address ..... Dependency.....
Name ..... Address ..... Dependency.....
Name ..... Address ..... Dependency.....

(d) Collateral heirs dependent upon the deceased at the time of the injury and the average annual contributions during the two years preceding the injury resulting in death:
Name Catherine J. Desper Address R.F.D. #1, La Salle, Illinois Contribution to be determined.
Name ..... Address ..... Contribution .....
Name ..... Address ..... Contribution .....

(e) If no widow or heirs survive give amount of funeral expenses:

7. Your petitioner prays that the Industrial Commission appoint an arbitrator to make such inquiries and investigations as he shall deem necessary, and that a day be appointed by said Industrial Commission and the time and place thereof fixed, where said arbitrator may hear such proper evidence as the parties hereto may submit, and that an award and decision may be made, in conformity with the statute in such case made and provided.

The undersigned requests that all notices of proceedings in the above entitled matter be served personally or by registered mail upon the party whose name and address follows as atttorney for petitioner: if no attorney's name

appears, then to the name and address of the undersigned.
Dated this 26th day of March, 1949.

(Signed) /s/Anna M. Desper
/s/ Catherine J. Desper
By Anna M. Desper
Her Mother and Next Friend

/s/ Joseph D. Ryan
/s/ Malone & Herbolsheimer
Attorneys for Petitioner.
Address Joseph D. Ryan, Suite 2007, 100 N. LaSalle St., Chicago 2, Ill.
Telephone FRanklin 5124
Malone and Herbolsheimer, State Bank Building, LaSalle, Ill.

53 EXHIBIT "B"

State of Illinois,
County of LaSalle—ss.

BEFORE THE INDUSTRIAL COMMISSION OF ILLINOIS

Anna M. Desper, mother of Thomas J. Desper, deceased, and Catherine J. Desper, a minor dependent sister of Thomas J. Desper, deceased; by Anna M. Desper, her mother and next friend,

Petitioners

vs.

Starved Rock Ferry Company, a corporation; and the Aetna Casualty and Surety Company,

Respondents

Starved Rock Ferry Company,

Petitioner

vs.

Thomas Desper, Sr., father, Anna M. Desper, mother, James Desper, brother, and Kathryn Desper, sister of Thomas Joseph Desper, deceased,

Respondents

DECISION OF ARBITRATOR

Notice and applications for adjustment of claim having been filed in the above entitled matter, and *Tom M. Garman* having been designated by said Commission as arbitrator thereof, and said matter having come on to be

heard before said Arbitrator at City Hall in the City of La Salle said County and State, on the 28th day of July, 1949; and, after hearing the proofs and allegations of the parties hereto, and having made careful inquiry and investigation of said matter and being fully advised in the premises, said Arbitrator finds:

That the deceased Thomas Joseph Desper and the Starved Rock Ferry Co. were on the 26th day of April, 1948, operating under the provisions of the Illinois Workmen's Compensation Act; that on the date last above mentioned said decedent sustained accidental injuries which did arise out of and in the course of the employment; and that notice of said accident was given said Starved Rock Ferry Co. and claim for compensation on account thereof was made on said Starved Rock Ferry Co. within the time required under the provisions of said Act.

That the earnings of the decedent during the year next preceding the injury were $1920.00 and that the average weekly wage was $36.92.

That decedent at time of injury was 21 years of age and had no children under 16 years of age.

That necessary first aid, medical, surgical and hospital services have been provided by the respondent herein.

That Anna Desper, mother of Thomas Joseph Desper, deceased, is entitled to have and receive from said Starved Rock Ferry Co. the sum of $19.50 per week for a period of 266 weeks, and one week at $13.00, as provided in paragraph (b) of Section 7 of said Act, as amended, for the reason that the injuries sustained caused the death of
54 Thomas Joseph Desper, on the 26th day of April, 1948, leaving him surviving Anna Desper, his mother, who was totally dependent upon the earnings of said decedent for her support. That this award and each of the installments thereof shall be paid to the mother of said decedent for her sole use and benefit, until the further order of the Industrial Commission, as provided in Section 21 of said Act, as amended.

The Arbitrator further finds that decedent also left him surviving at the time of his death, Thomas Desper, Sr., his father, who departed this life on, to wit, the 1st day of February, 1949, and a minor dependent sister, Catherine J. Desper.

That no compensation has been paid on account of said injury and resultant death.

That said Anna Desper, mother of Thomas Joseph Desper, deceased, is now entitled to have and receive from Starved Rock Ferry Co. the sum of $1,638.00 being the amount of compensation that has accrued from the 26th day of April, 1948, to the 6th day of December, 1949, the remainder of said award to be paid to said mother by said Starved Rock Ferry Co. in weekly payments, commencing one week from the date last above mentioned.

Dated and Entered this 9th day of December, 1949.

Tom M. Garman
Arbitrator

EC
55

EXHIBIT "C"

December 14, 1949

REGISTERED MAIL
RETURN RECEIPT REQUESTED
Malone and Herbolsheimer
State Bank Building
LaSalle, Illinois
Attention: Mr. Herbolsheimer

Re: 8 CC 33615—Starved Rock Ferry Company—Thomas Joseph Desper, Deceased—Anna M. Desper, Mother

Gentlemen:

Our attorneys have favored us with a copy of the award as rendered by the Industrial Commission of Illinois on December 9, 1949, and pursuant to the order of the Commission, we are enclosing our draft in payment of the accrued compensation.

The enclosed check is in the amount of $1,716.00 payable to Anna M. Desper, Mother of Thomas Joseph Desper, Deceased. It covers 88 weeks of compensation at the rate of $19.50 per week for the period from April 27, 1948 to January 2, 1950.

Will you kindly ask your client if she desires that the future payments which are to be made at the rate of $19.50 per week, be made on a monthly basis, and we would also appreciate being advised as to whether or not you desire these checks to be forwarded direct to your office or whether they should be sent direct to your client, Anna M. Desper. The balance of compensation involved over and above the $1,716.00 represented by the enclosed check is $3,484.00, which we shall be glad to pay on whatever basis your client prefers.

Incidentally, if Mrs. Desper desires a lump sum pay-

ment, we are willing to cooperate in every way possible to get the Industrial Commission to approve a lump sum settlement for the balance due her. We would appreciate an expression from you at an early date in reply to the questions contained herein so that we may be able to comply with the wishes of your client.

Yours very truly,
The Aetna Casualty & Surety Company
By /s/ John A. Bachl

JABachl/sc
Enclosure.
cc: Mrs. Anna M. Desper
Mr. Charles W. Helmig

56

EXHIBIT "D"

MALONE AND HERBOLSHEIMER

State Bank Building
La Salle, Illinois

December 16, 1949

The Aetna Casualty and Surety Company
Claim Department
Suite 1515
120 S. La Salle Street
Chicago 3, Illinois
Attention: Mr. John A. Bachl
Gentlemen:

Re: 8 CC 33615—Starved Rock Ferry Company—Thomas Joseph Desper, Deceased—Anna M. Desper, Mother

We acknowledge receipt of your communication of December 14 in which you enclosed your draft #11D-02725 payable to Anna M. Desper, mother of Thomas Desper, in the sum of $1,716.00, being a partial payment on death benefits per Illinois Industrial Commission Award—88 weeks @ $19.50 per week, period of from 4/27/48 through 1-2-50, both inclusive.

We are returning herewith the above mentioned draft by registered mail for the reason that the issuance thereof, in our opinion, was somewhat premature, especially since the award of the Arbitrator had not become final in the case.

For your information, we contemplate filing a petition to review the award of the Arbitrator and feel rather certain that when the matter reaches either the Industrial Commission as a whole or the Circuit Court, a finding will be handed down that the Industrial Commission had no jurisdiction whatsoever in the matter.

We regret our attitude in this matter, but under the circumstances we have no alternative but return your draft pending final disposition of this case.

Very truly yours,
Malone And Herbolsheimer
By /s/ George L. Herbolsheimer

GLH:MJD (Registered)
ENC. 1

57

EXHIBIT "E"

STATE OF ILLINOIS
INDUSTRIAL COMMISSION
160 N. La Salle Street
Chicago 1, Ill.

Anna M. Desper, mother of Thomas J. Desper, deceased, and Catherine J. Desper, a minor dependent sister of Thomas J. Desper, deceased, by Anna M. Desper, her mother and next friend,

Petitioners

vs.

Starved Rock Ferry Company, a corporation; and the Aetna Casualty and Surety Company,

Respondents

No. 420756

Starved Rock Ferry Company,

Petitioner

vs.

Thomas Desper, Sr., father, Anna M. Desper, mother, James Desper, brother, and Kathryn Desper, sister of Thomas Joseph Desper, deceased,

Respondents

PETITION FOR REVIEW OF DECISION OF ARBITRATOR

Now comes Anna Desper, et al of La Salle, Illinois, and respectfully petitions the Honorable Industrial Commission of the State of Illinois as follows:

That said commission shall review the decision of the arbitrator, duly appointed according to law, in the above entitled cause, which decision of said arbitrator was filed with the Industrial Commission on the 9th day of December, 1949.

Your petitioner represents that an agreed statement of facts or correct transcript of evidence of the proceedings before said arbitrator will be filed by your petitioner as required by law.

Your petitioner further represents that said decision of the arbitrator should be reviewed by the Industrial Commission, for the following reasons, to-wit:

58 1. That the Industrial Commission of Illinois was and is without jurisdiction to decide the issues presented by the facts of this cause.

2. That the arbitrator was and is without jurisdiction to decide the issues presented by the facts of this cause.

3. That the arbitrator erred in admitting over the objection of this petitioner improper and incompetent evidence offered by the respondents.

4. That the decision of the arbitrator is contrary to the evidence.

5. That the decision of the arbitrator is contrary to the law.

6. That the decision of the arbitrator is contrary to the law and the evidence.

7. That the decision of the arbitrator is against the clear preponderance of the evidence.

8. That the decision of the arbitrator is against the manifest weight of the evidence.

Your petitioner therefore prays that proper notice in accordance with the statute may be given to the parties interested herein and that a date may be set by the Honorable Industrial Commission for a hearing upon this petition for review, and that upon such hearing said Commission may modify or vacate the order and decision of the arbitrator,

as in the opinion of said Commission the facts and circumstances shall warrant.

And your petitioner will ever pray.

Anna Desper
By: /s/ Joseph D. Ryan
Her Attorney

Joseph D. Ryan
100 N. La Salle St., 2007
Chicago 2, Ill.
FRanklin 2-5124
Attorney for Petitioner

59 And on the same day, to wit, on the 20th day of April, 1950, being one of the days of the regular April term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Michael L. Igoe, District Judge, appears the following entry, to wit:

60

IN THE UNITED STATES DISTRICT COURT

* * (Caption—No. 49 C 481) * *

This being the day to which this cause was continued for further trial again come the parties to this suit by their attorneys, respectively, whereupon the defendant files a written motion for leave to file an Amended Answer, the arguments of counsel are heard thereon and said motion is overruled and the Jury heretofore empaneled and sworn herein also come and the trial proceeds and during the examination of witnesses for the plaintiff the hour of adjournment having arrived it is

Ordered that the Jury be and they are hereby permitted to separate until April 21, 1950.

61 And on the same day, to wit, on the 24th day of April, 1950, being one of the days of the regular April term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Michael L. Igoe, District Judge, appears the following entry, to wit:

62

IN THE UNITED STATES DISTRICT COURT

* * (Caption—No. 49 C 481) * *

This being the day to which this cause was continued for further trial again come the parties to this suit by their attorneys, respectively, and on motion of the plaintiff by counsel it is

Ordered that leave be and it is hereby given to the plaintiff to file an amended complaint instanter and that the defendant be and is hereby given leave to file an answer thereto instanter, whereupon the defendant by counsel enters its motion orally to strike paragraph 4 of the amended complaint and said motion is taken under advisement by the Court and the Jury heretofore empaneled and sworn herein also come and the trial proceeds and at the close of plaintiff's evidence the defendant by its counsel enters herein its motion for a directed verdict of Not Guilty the arguments of counsel are heard thereon and said motion is overruled, the arguments of counsel are heard on defendant's oral motion to strike Paragraph 4 of the amended complaint and said motion is overruled and the examination of witnesses proceeds and at the close of all the evidence the defendant by its counsel renews its motion for a directed verdict of Not Guilty the arguments of counsel are heard thereon and said motion is overruled and the hour of adjournment having arrived it is

Ordered that the Jury be and they are hereby permitted to separate until April 25, 1950.

63 And, afterwards on, to wit, the 21st day of April, 1950 came the Plaintiff by her attorneys and filed in the Clerk's office of said Court her certain Amended Complaint in words and figures following, to wit:

64

IN THE UNITED STATES DISTRICT COURT

* * (Caption—No. 49 C 481) * *

AMENDED COMPLAINT.

Now comes Anna Desper, Administratrix of the Estate of Thomas J. Desper, Jr., Deceased, plaintiff herein, by Joseph D. Ryan, and Malone and Herbolsheimer, her attorneys, leave of Court being first had and obtained, and files this, her Amended Complaint, and says:

1. That the defendant, Starved Rock Ferry Company, a corporation, is an Illinois corporation, having its principal place of business at Starved Rock Park, LaSalle County, LaSalle, Illinois, in the Northern District of the State of Illinois; that this action is brought pursuant to the provisions of a certain Act of Congress known as the Merchant Marine Act or the Jones Act.

2. On and prior to April 26th, 1948, Thomas J. Desper, Jr., plaintiff's decedent, was a seaman employed as a river boat operator by the defendant, Starved Rock Ferry Company, a corporation; that said defendant was in the business of operating ferry boats carrying passengers for hire on the Illinois River, a navigable river; and at the time and place of the accident hereinafter complained of, the decedent and the defendant were subject to the provisions of the said Merchant Marine Act.

65 3. On the date aforesaid, a large loading boat or barge, owned, operated and maintained by the defendant, was moored in Edward's Run, a body of water in immediate proximity to the Illinois River, and the decedent was on said boat or barge, in the due course of his said employment, near defendant's vice principal who was engaged in manipulating a nut on a certain fire-extinguisher being prepared for use on one of said ferry boats of the defendant.

4. At the time of the accident hereinafter complained of, plaintiff's decedent was aiding in the readying and fitting out of defendant's ferry boats for operation in the Illinois

River by plaintiff's decedent as a licensed operator of such boats, and decedent's duties as said employee were in furtherance of navigation, and directly or closely and substantially affected navigation within the meaning of the said Merchant Marine Act.

5. While the decedent was so engaged, in the due course of his employment, the defendant, Starved Rock Ferry Company, a corporation, by its agent and servant:

(a) Carelessly and negligently failed to provide safe appliances, and then and there carelessly and negligently permitted and allowed said fire extinguisher to be upon said landing barge in a defective, insufficient, unsafe and dangerous condition.

(b) Carelessly and negligently and without proper precaution opened said fire extinguisher so that gas contained therein at a high pressure was released with explosive force.

(c) Carelessly and negligently failed to warn the decedent of the danger attendant upon the removal of the nut on said fire extinguisher, when it knew or, in the exercise of ordinary care, could have known that such an operation would be attended with great hazard and danger to persons nearby.

(d) Carelessly and negligently failed to exercise or-
66 dinary care to furnish plaintiff's decedent with a safe place to work, contrary to and in violation of the Merchant Marine Act.

6. As a direct and proximate result of one or more of the negligent acts or omissions aforesaid, and in consequence thereof, the said fire extinguisher or parts thereof were propelled with great force and violence against the decedent's body and inflicted injuries upon him which resulted in and caused his death on said date.

7. The decedent left surviving him Anna Desper, his mother, who is now living and has sustained pecuniary loss and damage as a result of decedent's death.

8. This action is brought within three years of the death of decedent, and plaintiff brings herewith her letters of administration as evidence of her right to sue.

Plaintiff, Anna Desper, Administratrix of the Estate of Thomas J. Desper, Jr., Deceased, asks Judgment for Fifty Thousand Dollars ($50,000.00).

Joseph D. Ryan
Malone & Herbolsheimer
Attorneys for Plaintiff
Joseph D. Ryan
Malone and Herbolsheimer
100 North La Salle St.
Chicago 2, Illinois
Fra. 2-5124.

Plaintiff Hereby Demands a Trial by Jury.

67 And afterwards on, to wit, the 25th day of April, 1950 came the Defendant by its attorneys and filed in the Clerk's office of said Court its certain Answer To Amended Complaint in words and figures following, to wit:

68 State of Illinois
County of Cook—ss.

IN THE UNITED STATES DISTRICT COURT

* * (Caption—No. 49 C 481) * *

ANSWER TO AMENDED COMPLAINT.

The defendant, by Angerstein & Angerstein and Charles T. Shanner, its attorneys, answering the amended complaint of the plaintiff,

1. Denies that on or prior to April 26, 1948, Thomas J. Desper, Jr., was a seaman within the meaning of the Merchant Marine Act of 1920 and denies that he and the defendant were on the 26th day of April, 1948, subject to the provisions of the said Merchant Marine Act of 1920.

2. Denies that the defendants vice principal was engaged in manipulating a nut on a certain fire extinguisher as is alleged in paragraph 3 of the amended complaint.

3. Denies all the allegations contained in paragraph 5 of the amended complaint and those contained in each and every sub-paragraph of said paragraph 5 of the amended complaint.

4. Denies all the allegations contained in paragraph 6 of the amended complaint.

69 5. Has no knowledge of the truth or falsity of the

allegations contained in paragraph 7 of the amended complaint so demands strict proof thereof.

6. Alleges that the plaintiff's intestate was guilty of contributory negligence which proximately contributed to cause his injury and death.

7. Alleges that prior to the time alleged in plaintiff's complaint, defendant had elected to conduct and operate its business and employment under and pursuant to the terms and provisions of the Workmen's Compensation Act of Illinois; that said election was in full force and effect on the 26th day of April, 1948; that on said day defendant and plaintiff's intestate were operating and conducting their business and employment under and subject to all of the terms and provisions of the Workmen's Compensation Act of Illinois (Ill. Rev. Stat. 1947, Chap. 48, sec. 138 et seq.); that the injuries sustained by the plaintiff's intestate and his resultant death were accidental and arose out of and in the course and scope of his employment by the defendant and that by virtue of said section 6 of the said Workmen's Compensation Act of Illinois the plaintiff is barred from maintaining this action but must pursue her remedy, if any she has, under the provisions of the said Workmen's Compensation Act of Illinois.

Denies that plaintiff is entitled to judgment in the sum of Fifty Thousand Dollars ($50,000.00) or any other sum.

Angerstein & Angerstein
Charles T. Shanner
Attorneys for Defendant

70 And on the same day, to wit, the 25th day of April, 1950 came the Plaintiff by her attorneys and filed in the Clerk's office of said Court her certain Reply in words and figures following, to wit:

71

IN THE UNITED STATES DISTRICT COURT

(Caption—No. 49-C 481)

REPLY.

Now comes the plaintiff, Anna Desper, administratrix of the Estate of Thomas J. Desper, Jr., Deceased, leave of court being first had and obtained, and files this, her Reply to the Answer of the defendant to plaintiff's Amended Com-

plaint, and says that plaintiff's decedent was not guilty of any negligence which caused or contributed to cause the accident and injury which resulted in decedent's death.

Anna Desper
Administratrix of the Estate of
Thomas J. Desper, Jr., Deceased,
By: Joseph D. Ryan
Malone & Herbolsheimer
Her attorneys.

72

IN THE UNITED STATES DISTRICT COURT

* * (Caption—No. 49 C 481) * *

TRANSCRIPT OF PROCEEDINGS

had in the above entitled cause taken before the Hon. Michael L. Igoe, one of the Judges of said Court, and a jury, in his court room in the United States Court House at Chicago, Illinois, on Wednesday, April 19, 1950, at 2:00 o'clock p.m.

Appearances:

Mr. Joseph D. Ryan,
Messrs. Malone & Herbolsheimer, by
Mr. Louis G. Davidson and
Mr. George A. Sullivan,
appeared in behalf of the Plaintiff;

73 Messrs. Angerstein & Angerstein, by
Mr. Charles T. Shanner,
appeared on behalf of the Defendant.

74 (A jury was chosen and sworn to try the issues.)

(Thereupon a recess was taken in the above-entitled case to 10:15 o'clock a.m. of the following day, Thursday, April 20, 1950.)

75

IN THE UNITED STATES DISTRICT COURT

* * (Caption—No. 49 C 481) * *

Before Judge Igoe and a Jury,
Thursday, April 20, 1950,
10:15 o'clock a.m.

Court met pursuant to adjournment.

Parties Present:

Mr. Ryan,
Mr. Davidson,
Mr. Sullivan,
Mr. Shanner.

76 Thereupon, Plaintiff To Maintain the issues on her part introduced the following evidence, to-wit:

FRANK BAZZONI, called as a witness on behalf of the Plaintiff herein, having been first duly sworn, was examined and testified as follows:

Direct Examination.

By Mr. Davidson:

Q. Will you state your name, sir?

A. Frank Bazzoni.

Q. Where do you live, Mr. Bazzoni?

A. Ottawa, Illinois.

Q. And what is your occupation?

A. Photographer.

Q. And do you have a place of business there at Ottawa?

A. No, I operate out of my home.

Q. Out of your home. How long have you done photography?

A. For the past ten years.

Q. How long have you lived in and around Ottawa, Illinois, Mr. Bazzoni?

77 A. Well, I have lived there all my life, lived at Marseilles, which is seven miles from Ottawa, always in that vicinity.

Q. Where is that part of the State with regard to Starved Rock and the place called Buffalo Rock?

A. Well, Ottawa is, I believe, approximately seven miles east of Buffalo Rock.

Q. You say Starved Rock is seven miles—

A. No, Ottawa.

Q. Ottawa, pardon me.

A. Is seven miles east of Buffalo.

Q. During your lifetime, while you have lived in that vicinity, did you make trips through the years both to Starved Rock and to the dam above Starved Rock and the river above it?

A. Yes, I have.

Q. Have you been familiar through the years with this place I spoke of, called Buffalo Rock?

A. Yes.

Q. I might ask you, just for the record, to state your age, Mr. Bazzoni; will you do that?

A. Thirty-three.

Q. Did you, at the request of Mr. Herbolsheimer who got in touch with you—

78 A. Yes.

Q. — an attorney of LaSalle, Illinois, take photographs from different points of the area in the vicinity of Buffalo Rock and also from the mound nearby?

A. Yes.

Q. Now, you spoke of Buffalo Rock, what is that, what physical feature is Buffalo Rock?

A. Well, that is a large mound of sandstone. It is on the banks of the Illinois River and I believe was gouged out by the Illinois River.

Q. So that we go back to get a little picture of the physical conditions, Mr. Bazzoni, the Illinois River extends in what general direction in the vicinity of Buffalo Rock?

A. Well, the Illinois River is south of Buffalo Rock, Buffalo Rock is on the north bank of the Illinois River.

Q. The river itself extends in what general direction?

A. It is south, extending east and west.

Q. We have a little plat here, which has not yet been marked or identified, which purports to show the Illinois River coming up around this bend and then going out in this direction towards me.

Now, Buffalo Rock is described by name above the River on that plat. Now, as I understand it, the rock

79 is north of the river?

A. North of the river.

Q. The river runs in a generally easterly direction, that would be westerly, easterly direction, is that correct?

A. Yes.

Q. The rock you spoke of, is that just about the area indicated here on this map?

A. That is correct.

Q. Can you see that from where you are?

A. Yes.

Q. Now, if you go on west down the Illinois River do you come to a dam?

A. Yes.

Q. If I make any errors, will you correct me?

A. I have never taken that boat trip but I do know it is down there, by going around by way of automobile.

Q. All right, the dam is about how many miles west of Buffalo Rock?

A. Well, I would say it would be either six or seven.

Q. Now, when you come to the dam, is there a drop in the level of the river as you go on west or does the river level rise?

A. Well, that was the purpose of the dam, to raise
80 the water for navigable purposes.

Q. In what direction is the main flow of the water there?

A. To the west.

Q. As you go on to the west, comes this dam, there are some changes in the level of the water of the Illinois River?

A. That is right.

Q. As you go on beyond there, you are at a lower level?

A. Yes.

Q. Do you happen to know the difference in level of the river at those two places?

A. I think normally it is between sixteen and twenty feet.

Q. Have locks been built in there by the United States Government to provide for the accommodation of vessels which wish to move past the dam in either direction?

A. To the north of the dam there is a system of locks.

Q. That portion of the river I am indicating with my pencil?

A. Yes.

Q. Now, do you know how much beyond the dam the landing boat or quarter boat, as it is called, that the
81 Starved Rock Ferry Company maintained, was kept or ordinarily stationed, you are familiar with that?

A. Well, only by sight, I have used it on the Rock many times. I would say it is approximately one-half mile or so.

Q. Further west?

A. Further west.

Q. On which side of the River?

A. That is on the south side of the River.

Q. Now, can you tell us when you went out to the vicinity of Buffalo Rock to take the photographs which I have asked you about?

A. Well, they were taken yesterday.

Q. And that was the 19th, April 19th?

A. April 19th.

Q. Am I right on my date?

A. Yes.

Q. Did you take a number of photographs?
A. Yes, I did.
Q. What were the conditions of visibility at the time?
A. Well, we had—visibility was good when we waited until the sun shone brightly in order to get a sharper photograph and more contrast.
82 Q. Did you take these photographs so as to truly and correctly show the fixed, permanent conditions there such as the location of the River, islands, buildings and objects of that character?
A. Yes.

Mr. Davidson: Mark them for identification Plaintiff's Exhibits Nos. 1, 2, 3 and 4.

(Said photographs were marked Plaintiff's Exhibits Nos. 1, 2, 3 and 4 for identification.)

By Mr. Davidson:
Q. Are these two photographs the same, one merely an enlargement of the other?
A. Yes, they are.
Q. We will just use one of them, then. Take the larger. I would like to hand you the first photograph and ask you to tell us where the camera was placed when that picture was taken?

Mr. Shanner: By first, is that marked No. 1, you mean?

Mr. Davidson: It is No. 1.

By Mr. Davidson:
Q. And in what direction is the camera facing?
83 A. Well, this first photograph, the camera was—well, I was up on Buffalo Rock and the camera was in an east and a northeast position.
Q. In other words, it looked up the direction of the River away from the dam?
A. Yes.
Q. Taking the photograph as you did from Buffalo Rock, did you show in the foreground two sections there where the water flows in from the Illinois River to the north?
A. Yes.
Q. Can you tell us what the name is, if there is a name, for the nearest portion of water, where you stood, referring to this blue color on the map which looks something like a finger?
A. Well, that is a little inlet of water going to the

Consumer's gravel pits and their storage and I believe they call it the Consumer's Inlet.

Q. That is the one nearest to Buffalo Rock extending north from the Illinois River, is that right?

A. Yes, sir, that is right, at the foot of the Rock.

Q. All right sir. Are you familiar with the water in the inlet that goes north of the River just a little bit east of the inlet that you described?

84 A. Well, that is known as Edwards' Run.

Q. Now, you said something about the Consumers Company. Were you familiar with what use the Consumers Company was making of that inlet in 1947 and 1948?

A. Well, they have been using that for several years now to bring their gravel from an island in the middle of the river to the shore where they loaded onto railroad cars for shipment.

Q. Can you tell us how far up that inlet they go to reach the point where they load or unload their cars?

A. Well, I think that is approximately a mile long.

Q. Well, do they go up to the farthest, the most remote end of the inlet, that is what I am trying to ascertain.

A. Well, they cannot go all the way up. I don't know exactly that distance there, because they go up and unload.

Q. How far in do they go, do you know?

A. I don't know.

Q. All right, sir, do they go past the point where you were standing when you took those photographs?

A. Oh, yes, yes, they do.

Q. You say they have unloading docks in there?

A. Yes, they have unloading docks on the north

85 side of the inlet.

Q. This gravel they get from the island in the River, is that moved in and out on barges of some kind?

A. Yes, it is.

Q. What is used to propel the barge into the Consumers' docks?

A. They have tugs to push the barges back and forth.

Q. All right sir. Will you look at the next photograph which has been marked Plaintiff's Exhibit No. 2 for identification, and tell us where you were standing when you took that photograph and in what general direction the camera is facing?

A. Well, that photograph was taken from the same position but the camera was pointing north, approximate direction, and east.

Q. Is there any name that you know of for that small piece of land between those two inlets of water looking north of the River, the Illinois River?

A. No, I don't. Are you referring to where the boats are?

Q. To where the boats are.

A. No, I don't recall that piece of land.

Q. I show you another photograph which has been marked Plaintiff's Exhibit 3 for identification and
86 will you state where you stood when the photograph was taken and the direction the camera was facing?

A. That was taken from the same position but the camera was more to the north, northeast.

Q. I will show you one more photograph, marked Plaintiff's Exhibit No. 4 for identification, and tell us, if you will, where you stood to take that picture and the direction you faced your camera.

A. This picture was taken from the bluffs to the north of the railroad tracks, the bluffs were to the east and to the north of Buffalo Rock.

Q. When you say you stood north of the railroad track, would it be somewhere in this general area I am indicating here, sir?

A. Yes, that area there. There is a great high bluff of sand rock and there is a country road going up there and we went up there to see what the view was so I could shoot directly south.

Q. In what direction—oh, south, directly south?

A. Yes, the camera was pointing directly south.

Q. In the foreground you show the general area I indicate with my finger, that is Edwards' Run and the Consumers' Inlet, and the section of land between them where the boats were standing?

87 A. Yes.

Q. From your experience with the community, in living in that neighborhood for the many years you have, sir, can you tell us whether the Illinois River at that point is used by various kinds of traffic?

A. Well, the Illinois River has been taken over and is a navigable river for transportation from—

Mr. Shanner: Your Honor, I object to the use of the

word "navigable." I have no objection to him telling what traffic uses it.

Mr. Davidson: Well, I don't think there is much question about that, is there, Mr. Shanner?

The Court: Is there any dispute as to whether the Illinois River is a navigable river?

Mr. Shanner: I don't think there is but I think it would be better if the witness told what he saw or knew about it.

The Court: All right. They don't want you to use the word "navigable." That is a certain conclusion that they don't agree upon.

By the Witness:

A. Well, they do bring numerous barges of coal,
88 gravel, steel, sulphur, big barges that will take up eight or ten feet of water.

By Mr. Davidson:

Q. Up and down the Illinois River?

A. Up and down the Illinois River, yes, and they also use it for transporting Naval vessels from the Lake to the Mississippi and down to the ocean, the Gulf.

Q. Has that been true over a period of years?

A. Yes, it has been.

Q. Do you know when the dam was put in there, approximately?

A. Well, it is in its early thirties, between '31 and '33.

Q. Do you know what the depth of the water in the Consumers' Inlet extending past Buffalo Rock is?

A. No, I don't.

Q. Do you know what the depth, the draft is, of these loaded barges carrying gravel that go up that inlet past Buffalo Rock that are moved by these tug boats that you spoke of?

A. I don't know how heavy they do load those barges there, they are not as large or as heavily loaded as the barges that are going up and down the River.

Q. Now, Edwards' Run as it goes north from the
89 River, do you know what it connects up with or what leads into it?

A. There is a small creek that drains the right-of-way of the Rock Island Railroad and cuts across the road there and into Edwards' Run.

Q. Does the railroad right-of-way, or anything to indicate its location, appear in any of your photographs?

A. Yes, in No. 4.

Q. No. 4. In other words, that is right in front of where you were standing?

A. That is right below the bluff on which I was standing.

Q. Did you go onto that neck of land that extends out between those two inlets?

A. No, I have never been on that.

Mr. Davidson: All right, that is all. You may cross examine.

Cross Examination.

By Mr. Shanner:

Q. What is your address in Ottawa, Mr. Bazzoni?

A. Route 2 on North Bluff, Ottawa.

Q. Route what?

90 A. Route 2.

Mr. Davidson: I might say I offer these photographs in evidence. Let me have them to show Mr. Shanner, please.

Mr. Shanner: I have no objection, your Honor.

The Court: They may be admitted.

(Which said photographs, marked as Plaintiff's Exhibits Nos. 1, 2, 3 and 4, respectively, for identification, were thereupon received in evidence.)

By Mr. Shanner:

Q. Mr. Bazzoni, you say you have lived there substantially all your life or all your life?

A. Yes.

Q. I suppose as a boy you fished around those inlets?

A. No, I have never fished in the Illinois River. It is usually considered not the best place in the world to fish.

Q. I mean, before the dam was built, when you were a boy.

A. Well, even at that time.

91 Q. This Consumers' Run that you have been testifying about, do I understand you to mean that the Run itself was about one-half mile long, that is, the one-half mile from here to here? I don't want to misinterpret your testimony, you used the words "half a mile" and I didn't understand quite what you meant.

A. Well, that Run, it goes off into a slough or swamp and also it is, all told, approximately one-half mile.

Q. Including the slough or swamp, you mean?

A. Yes.

Q. How frequently have you seen the barges of the Consumers Company going in and out of this Run?

A. Well, during the summer we have numerous picnics on the Rock and from time to time we eat on the Rock and see the barges.

Q. What day of the week are those picnics, on Sundays?

A. No, on Thursdays.

Q. On Thursdays?

A. On Thursdays.

Q. How far have you seen barges go up into that Run?

A. Well, the exact distance from the mouth, I can't give, but they come in quite a distance and they land to the north side.

Q. Do any of these exhibits—well, this is north,
92 up this way?

A. Yes, that is correct.

Q. They land on this side?

A. Yes, they land on the north side.

Q. Do any of these photographs that you have taken show any permanent landmarks that would show about how far the barges go up?

A. I believe in No. 4 we can see a portion of it.

Q. Well, I will hand you Plaintiff's Exhibit No. 4 and ask you to state whether or not that does show where you yourself have seen barges go up?

A. Yes. No, this doesn't show where the barges are, it just shows a portion of that gravel storage.

Q. This so-called Consumers—that is it, what is it called, Consumers' Run?

A. Consumers' Run, I think it is.

Q. Consumers' Run, that was dredged, was it not?

A. That I don't know.

Q. Do you know whether or not it is dredged from time to time?

A. No, I don't.

Q. Do you know whether this other portion over here which you call Edwards' Run was ever dredged?

A. I have never seen it.

93 Q. Did you ever see any boats or barges in Edwards' Run other than this landing boat of the Starved Rock Ferry Company?

A. I have never noticed it.

Q. You go by there about how frequently?

A. Well, the only time I go by there is if I have any photographs to take out in that district or doing arial work or going to picnics.

Q. Well, you go to picnics once a week in the summer?

A. Approximately.

Q. You never noticed any boats in Edwards' Run during those times?

A. No.

Q. Your recollection is the dam was built sometime in the '30's, '31, '32 or '33?

A. That is right.

Q. Do you recall what the condition of the north shore of the River was before the dam was built, referring particularly to Edwards' Run and to Consumers' Run?

A. No.

Q. Do you recall there is a creek that comes in there?

A. Yes.

Q. Called what?

A. I don't know the name of the creek.

94 Q. Do you recall whether or not the creek itself came right down to the north bank of the river before the dam was put in?

A. I would say yes.

Q. Do you know how deep the water is in Edwards' Run?

A. No, I don't.

Q. Do you have any recollection, sir—you see this accident happened on April 26th, 1948, these photographs were taken on April 20th, 1950, have you any recollection as to whether the conditions were about the same, it is about the same time of month in so far as trees and those things are concerned.

A. Well, as far as I know, they are the same.

Q. Now, the barges and [redacted]e vessels that use the River, the Illinois River, and the [redacted]val vessels that you referred to that use the River channel, they use this channel down here to the south?

A. At present they do. That channel was put in approximately a year ago. Prior to that they went around the Horn.

Q. Wasn't that put in about 1947, that channel?

A. No, it was after that, that was a new channel that was dredged through there to eliminate going around that hump.

95 Q. You say that was done last year?
A. Well, I don't recall correctly, it was completed within the last year and a half.
Q. Well, this is April of '50.
A. Yes, I don't know the exact date on that. I know there was a little doings there where they had some State officials.
Q. Well, that was the dedication?
A. The dedication of it and I don't know the exact date.
Q. When did the River traffic start using it?
A. That I don't know.
Mr. Shanner: I think that is all, your Honor.

Redirect Examination.

By Mr. Davidson:
Q. Mr. Bazzoni, as I understand you have never noticed any large boats using Edwards' Run, is that true?
A. No, I have never seen it.
Q. Do you know of your own knowledge what use small boats make of Edwards' Run?
A. About the only thing I would see, they use it for duck hunting.
Q. Other than the use of the barges and the tug
96 boats of the Consumers' run, as I understand you, and that it doesn't go on, going to the north and connect up with any other body of water?
A. No.
Mr. Davidson: That is all. Thank you, sir.

Recross Examination.

By Mr. Shanner:
Q. Just one more question: When you go duck hunting, you use a duck boat, don't you?
A. Well, I don't know, I don't go duck hunting so I don't know.
Q. Let me ask it, then, this way: what kind of boats did you see used in Edwards' Run by persons who were duck hunting?
A. Well, if they were duck hunting, they would naturally use a small boat which would be powered with a small gasoline engine or outboard motor or by rowing.
Q. Have you seen them in there, duck hunting?
A. I have not noticed them, no.

Mr. Shanner: That is all.

(Witness excused.)

Mr. Davidson: I wonder if we might show these photographs to the jury either now or at two o'clock.

97 The Court: Better wait until two o'clock. It is pretty close to lunch time now.

We will take a recess to 2:00 o'clock.

(Thereupon a recess was taken to 2:00 o'clock p.m. of the same day, Thursday, April 20, 1950.)

98

IN THE UNITED STATES DISTRICT COURT

* * (Caption—No. 49 C 481) * *

Before Judge Igoe and a Jury,
Thursday, April 20, 1950,
2:00 o'clock p.m.

Court met pursuant to a recess.

Present: Same as before.

ROBERT KENNEDY, called as a witness on behalf of the Plaintiff herein, having been first duly sworn, was examined and testified as follows:

Direct Examination.

By Mr. Davidson:

Q. Will you give us your name, please?

A. Robert Kennedy.

99 Q. Mr. Kennedy, will you speak loud enough so that the jurors farthest away from you can hear you?

A. Yes, sir.

Q. Where do you live, Mr. Kennedy?

A. I live in Ottawa, Illinois.

Q. And do you have a street or post office box number?

A. I have a post office box, 308.

Q. How long have you lived in Ottawa?

A. Ten years.

Q. What is your occupation?

A. I am a painting contractor.

Q. Where is your place of business located?

A. Ottawa, Illinois.

Q. And do you work from your home?

A. No, I have an office.
Q. All right, sir. Are you in business for yourself?
A. Yes, sir.
Q. Were you in the same business in April, 1948?
A. Yes, sir.
Q. Did you do some work in April, 1948, for the Starved Rock Ferry Company, a corporation?
A. I did.
Q. Had you worked for them in any previous year?
A. No, sir.
100 Q. How did you happen to do some work for them in April, 1948?
A. I was hired to do the painting job on the boats by Mr. Birkenbuel.
Q. Who is Mr. Birkenbuel, sir?
A. He was the owner or the proprietor of the Starved Rock Ferry.
Q. He was one of the officers of the company, is that it?
A. That is right.
Q. What was his first name, Charles?
A. Charles.
Q. About how old a man was he, do you know?
A. No, I do not.
Q. When did you start to work there? Can you give us the approximate date?
A. I cannot. It was the early part of April, I would not say the exact date.
Q. In any event, was it prior to the accident in which Thomas Desper was killed?
A. Yes, sir.
Q. And in which Mr. Birkenbuel also sustained fatal injuries?
A. Yes, sir, it was prior to that.
101 Q. What was the nature of the work you did there from the time you started until the accident on April 26th?
A. We were cleaning the boats, priming the metal, painting and varnishing, water-proofing and everything else that went along with the work.
Q. Were you assisted in that work?
A. Yes, sir.
Q. Were there any others partaking in that work at that time?

A. I had a man working for me.
Q. Who was the man you had?
A. Michael Lewis.
Q. How is the last name spelled, L-e-w-i-s?
A. That is right.
Q. He was assisting you in whatever you were doing, is that it?
A. That is right.
Q. Now, were there any other men that Mr. Birkenbuel had brought in?
A. At various times when help was needed, James Desper and Thomas Desper were assigned to me to work.
Q. What do you mean they were assigned to you at various times when work was needed? Can you explain that?
102 A. Well, when the work would require the handling of life preservers and things like that, they would carry them into position and then carry them away.
Q. What work did James Desper and Thomas Desper do when they were not assigned to you?
A. Their duties were varied. They helped fabricate the boat that was being built. They assisted in welding and did some welding and other duties around the yard that required their particular services.
Q. Did they render some assistance in connection with the motors being readied in the boat?
A. Yes, sir.
Q. What boats were being worked on at that time?
A. I cannot tell you that. They both had names, but I do not remember any of the names of the boats.
Q. Can you describe the kind of boats, and how many there were?
A. They were ferry boats that were used on sightseeing tours. They were flat top boats, driven by gasoline motors, and were being used to transport passengers up in the little dells and canyons that were above the dam at Starved Rock.
Q. That is they had their own power?
A. They were powered by themselves.
103 Q. And they were used on the Illinois River above the dam?
A. They were.
Q. Now, do you know how many of these ferry boats

there were that were being readied at that time? If you don't know, it is all right, Mr. Kennedy. We will find out.

A. I would not say for sure but I believe there were five.

Q. Now, was there also a large boat known as a house boat or quarter boat standing in the water?

A. Yes, sir.

Q. Can you give us any idea of the size of the large boat?

A. Well, I would say it would be between 100 and 125 feet long and possibly 36 feet wide. It was a double deck affair.

Q. Do you know what use was being made of that boat at that time?

A. Well, at that time it was being used as a machine shop, and storage for material that could not be left out in the yard. It was also living quarters for machinists and Mr. Birkenbuel had an office in there.

Q. Now, besides these men you have mentioned, were there any other men besides those, and those men assisting in this work that was being done, so far as you remember?

A. In my work?

Q. In this general work of readying these boats for placing them in the water?

A. Yes, I believe there were three others.

Q. Three other men?

A. That is right.

Q. All right, sir. Can you tell us how far that work had progressed at the time of this accident on April 26th?

A. My work?

Q. Well, the work generally, including yours, too?

A. Well, the boats were being readied for launching. The motors were being tested. One boat was being—the final touches were being put on it. I had already painted them, and at that time we were treating the life preservers, at the time of the accident.

Q. Were any boats yet to be painted, or had they all been painted?

A. They had all been painted but the floating dock.

Q. What are these floating docks, Mr. Kennedy?

A. I don't know what the purpose of those was.

105 Q. Where were the floating docks that had not been painted?

A. They were anchored beside the house boat.

Q. On the far side of the house boat?

A. Yes.

Q. How many of those were there, if you know?

A. Two, I believe.

Q. Now, was there a marine rail leading from the land down into the waterway known as the Consumers' Run?

A. There was.

Q. Was there a single track or more than one track?

A. A single track.

Q. Can you tell us about how far that track extended on to the land from the water's edge, approximately?

A. Oh, a quarter of a mile.

Q. You may state whether, on April 26th, any of these ferry boats were standing on that rail.

A. There were.

Q. Were they all on the rail at that time, sir?

A. No, sir.

Q. Were any off the rail, as you remember?

A. One.

Q. One of them?

106 A. Yes, sir.

Q. What was being done with that boat?

A. That was being built.

Q. That was to be a new boat?

A. Yes, sir.

Q. Were all the older boats that had been in service previously finished and standing on the rail?

A. Yes, sir.

Q. Who was building the new boat?

A. I do not recall the men's names, at the present time, but Mr. Birkenbuel and Mr. Claudnic were overseers or foremen on the job, and they spent some time on there, and at that time Tom Desper and James Desper assisted in the fabrication of the new boat.

Q. Was Tom Desper doing all this work you described in readying these boats?

A. Yes, sir.

Q. Now, was there anything more to be done on these boats that you know of, anything substantial, preparatory to moving them down into the water?

A. Not that I recall, no.

Q. Now, at that time, Mr. Kennedy, was there a place where the Consumers Company, the gravel and supply company, had a place of business located somewhere
107 near that Consumers' Run?

A. The Consumers had a gravel pile and wash rack and clam shell and an office directly west, adjoining the property that these boats were sitting on.

Q. This little map, can you see it from where you are?

A. I can see it, but that is about all.

Q. Well, maybe we had better move it up a little bit. It is pretty far away.

Mr. Davidson: I wonder, if we might put it next to the witness, your Honor, where he can handle it better.

By Mr. Davidson:

Q. We have had these two blue colored portions of water described and named and identified. The larger one is named Edwards' Run. Is that your understanding of the name of it?

A. Yes, sir.

Q. There is one to the left that has been called Consumers' Run?

A. That is right.

Q. Now, can you place a little mark on that, showing where the marine rail is extended from the water's edge?

Mr. Shanner: Your Honor, I think if that
108 is going to be used, it ought to be put in evidence, that is, if it is going to be marked in the presence of the jury.

The Court: I thought it was in evidence.

Mr. Davidson: I do not think it has actually formally been offered. I thought it was understood it was going in, but we can have it numbered 5.

The Court: I thought you agreed that they might use it.

Mr. Shanner: You asked me if there was any objection to it, and I said I agreed it was a map of the Army Engineers.

The Court: Why don't you have it numbered and then introduce it so that you can refer to it by number?

Mr. Shanner: That is what I was suggesting.

The Court: I think that is a good suggestion.

Mr. Davidson: I will adopt it, your Honor.

Would you mark this Plaintiff's Exhibit No. 5 for identification?

(Said document was marked Plaintiff's Exhibit No. 5 for identification.)

109 By Mr. Davidson:

Q. The map to which we have been referring, Mr. Kennedy, is now marked Plaintiff's Exhibit No. 5 for identification. I will offer it in evidence as that exhibit, your Honor.

Mr. Shanner: I have no objection.

The Court: It may be admitted.

(Which said document, so marked as Plaintiff's Exhibit No. 5 for identification, was thereupon received in evidence.)

By Mr. Davidson:

Q. Will you look at the map now, sir, and place a mark on this map with this pen the approximate position that the marine rail comes to the water's edge. What direction does it run when it goes away from the water?

A. It runs inland, a little northeast.

Q. In other words, the small ink mark you have placed there—I will put a little circle around it—you have put two little ink marks alongside of each other, indicating the two rails of the track as it comes to the water's edge?

A. Yes, sir.

110 Q. Now, where is the Consumer's Company equipment you spoke of, the clam shell and their offices and stone pile?

A. Right here.

Q. Will you also mark that with the letter "A"?

A. (Indicating).

Q. Now, moving their barges in and out of the Consumers Company with their tug boats, do they have to pass or did they pass the marine track at the point where they came down to the edge of the water?

A. Yes, each trip.

Q. What type of load did these barges carry when they came moving in with loads on them?

A. Gravel. Is that what you mean?

Q. Yes. Where was the gravel taken, do you know which of these islands it was taken from?

A. I don't know which island it was taken from, no, sir.

Q. Was use being made of that Consumers' Run during at least a year or two before this accident in April of 1948?

A. I do not understand your question.

Q. I am glad to have you tell us, if you don't, sir. Had the Consumer's Company had their offices and equip-
111 ment and barges in that place before 1948?

A. I cannot answer that, I don't know.

Q. You don't know whether they were there in previous years or not?

A. A year, but years I would not say.

Q. All right, even a year may cover what we want to know. Had they been there at least a year before?

A. I would say that, yes.

Q. Now, how were these boats which stood on the marine rail held in place?

A. They were on piling.

Q. On what?

A. On piling. They were blocked up.

Q. With blocks?

A. Yes, sir.

Q. Do you know what was necessary to release the boats to permit them to move down into the water?

A. I don't quite understand you.

Q. I was wondering what was necessary to be done to move the boats down into the water.

A. The boats had to be jacked up and dollies placed under the boats, the blocks taken out, and the boats let back down on the dollies, and then placed in the water by winch methods.

112 Q. Can you give us approximately some idea how long it would take to do that with each boat?

A. I could not.

Q. Were you there when that was done? After the accident?

A. Yes.

Q. Did you see them do that?

A. I did, but I was busy doing other work and I did not take any notice of the time.

Q. Do you remember the date when they began to put the boats into the water after the accident?

A. The exact date I could not say.

Q. Do you remember about how soon after the accident?

A. It was in May, but I could not say the exact date.

Q. Now, the house boat itself, or the quarter boat, was resting on, or was supported in what way on the water, if you know?

A. I was under the impression the boat floated, but it

had two cylinders that were driven down in to the mud to hold it in place.

Q. So that it would not drift around or move away?

A. That is it.

Q. On this particular day that the accident happened, what were you doing at the time of the occurrence?

113 A. I was preserving life preservers or treating life preservers.

Q. About how many of those had you done or treated?

A. The exact count would be hard to say. I would say between five and six.

Q. Did you have many more to do?

A. About a hundred and fifty, I believe. That is what we had left.

Q. About how long would it take you to finish that work, based on what it had taken on the first portion of the life preservers?

A. About two hours.

Q. Were you doing that work alone or was there anyone helping you?

A. I had Michael Lewis and Jim Desper and Tom Desper helping me.

Q. As far as you know, did anything more have to be done to ready the equipment on the boats for launching?

A. I don't know.

Q. After the preservers had been treated, then they were then to be placed, I suppose, a given number in each boat?

A. That is right.

Q. In treating the preservers, what did you actually

114 do, just briefly?

A. The preservers were unfolded and placed over saw horses, and were sprayed on each side with cuprinol, a preservative.

Q. Who was doing the spraying?

A. I was.

Q. You were handling the equipment yourself?

A. Yes, sir.

Q. Were you working with Tom, a group of men?

A. Yes, sir.

Q. Those three men you mentioned, besides yourself?

A. Yes, sir.

Q. What kind of a day did the accident happen?

A. The exact time I couldn't say, but between two and three in the afternoon.

Q. Where did it happen, at what place?

A. On the lower deck on the boat, of the house boat.

Q. Was it in some particular room on the boat?

A. I don't know what they use the room for, except for a passageway when it was hooked on the land at Starved Rock, and customers walked through there and bought their tickets to board the floating dock.

Q. It was a sort of big open area; it was what you might describe as a lobby on the interior of the boat?

115 A. Yes.

Q. What other work, if any, was going on in that room at the time you men were treating these particular preservers?

A. There was no other work going on in there.

Q. Just before the accident happened, did you observe Mr. Charles Birkenbuel in that room doing something?

A. Yes.

Q. Will you tell the Court and jury what he was doing, sir?

A. Mr. Birkenbuel was on his hands and knees with a crescent wrench, apparently trying to remove a brass nut from a fire extinguisher.

Q. Had you seen these fire extinguishers? Did you know where they came from?

A. I know where they came from.

Q. Will you tell us about it, sir?

A. They were war surplus fire extinguishers made by Kidde. They were carbon dioxide extinguishers.

Q. Can you tell us anything about the size of the extinguisher, its color, or any other way you can describe it?

A. It was a sort of olive drab, approximately eighteen inches high and maybe six inches in diameter.

116 Q. Was there anything at one end of it in the way of brass couplings or fittings?

A. There was a brass nut on one side, and another brass fitting to hook onto a line, and a brass cap.

Q. Have you finished your description of it, sir?

A. Yes.

Q. Were those brass attachments you have just described at one end of the extinguisher?

A. The top of the extinguisher was shaped similar to a "T." The brass nut and the brass fitting were opposite each other, and the connecting fittings set at an angle from the two—that is, the brass fitting and the brass nut.

Q. Well, was the extinguisher itself somewhat cylindrical in shape?

A. It was.

Q. If you rested it on its face, as I understood you, it stood about eighteen inches high?

A. That is about right.

Q. Were these brass fittings and bolts you have described, or nuts, all at the top portion of this fire extinguisher?

A. They were.

Q. About how heavy was the fire extinguisher empty?

117 A. Oh, I would say around 30 pounds, maybe more. I did not weigh it.

Q. What had it been in, if you know?

A. It had been in a paper carton prior to the time it was taken out.

Q. Was there anything on these brass fixtures, any indication of warning, any colored identification?

A. One side of the brass cap that screwed in was coated with red, and the cap to protect the spread that hooks onto a line was also painted red.

Q. Now, you say Mr. Birkenbuel was working there with a crescent wrench. Will you describe what a crescent wrench is, its length and approximate size?

A. Well, this wrench was approximately fifteen inches long, used for heavy duty work. It was a very heavy wrench. I would say three-quarters of an inch thick, and would open up to take possibly a nut of an inch and an eighth size.

118 Q. The part that Mr. Birkenbuel was applying his wrench to was where?

A. It was on the side of the stem that protrudes from the top of the extinguisher.

Q. Do you recall now whether the extinguisher stood in an upright position or was on its side?

A. It was standing in an upright position.

Q. Did you notice anything of an unusual nature about him or what he did when he applied the wrench to that part of the fire extinguisher?

A. As he started to back out the nut, a hissing occurred and he was warned that gas was escaping.

Mr. Shanner: Now, that I object to and move to strike.

The Court: Yes.

Mr. Davidson: Well, they object to the form of the question.

The Court: You can say what he said but you must not conclude what he meant.

Mr. Davidson: That is right, you can tell what was said by somebody.

The Court: Use his language or use the language of the persons who were in and around there that you heard.

119 By the Witness:

A. He was told that the gas was escaping.

By Mr. Davidson:

Q. Would you give us the substance, the words used, as closely as you can remember?

A. Well, the exact words are, "Charles, that damn thing is leaking."

Q. Who said that, by the way?

A. James Desper at that time.

Q. You spoke of a hissing sound; how did it appear to you, Sir?

A. Not unlike a steam radiator.

Q. Now, at the time that Mr. Birkenbuel was working on this fire extinguisher with the Crescent wrench, working on the nut, was anyone with him or was he doing that alone?

A. He was doing that alone.

Q. After this statement was made to Mr. Birkenbuel, did he continue to work on that brass attachment or did he stop?

A. He turned the nut back in and removed a little square tag and put on his glasses and read the tag and then took his glasses off and laid it on the bench and throwed the tag down.

120 Q. Did you learn later what that tag was that he had looked at?

A. I did.

Q. Would you tell us what the tag was?

A. Right now I can't, it was not an instruction tag.

Q. That is what I want to know. Did it have any instructions, any directions on it about how to use the container?

A. The exact words I can't tell you at this moment.

Q. After Mr. Birkenbuel had gone through these maneuvers you spoke of and then took his glasses off again and put them down, what did he do next?

A. He picked up the wrench and applied it to the nut

he made a motion of loosening it.

Q. Did you notice anything about what Tom Desper did or where he had gone during that time while this was taking place?

A. At that time he was hanging life preservers on a rope to dry and he had walked over to the side and a little in front of Mr. Birkenbuel.

Q. When Mr. Birkenbuel was working on this container with the wrench, when he started on it the second time, was he still down near the ground in the same position?

A. He was on his knees.

121 Q. Did you notice whether or not Tom got down at any time or did he remain upright, can you tell us about that?

A. He was standing with his hands on his knees, sort of leaning over.

Q. All right. Did something else occur shortly afterwards, and if so, how long afterwards?

A. Well, it was very, very quickly afterwards, a pop and the room was filled full of gas.

Q. Were you operating a motor driven sprayer?

A. I was operating an air driven sprayer.

Q. And what happened when you heard this pop besides the gas filling the room?

A. Well, the two helpers that were helping me ran out of the room up the gangplank and it was impossible to see. I turned to see what I could see and the room was full of black smoke.

Q. Black soot?

A. No, not black soot; a very heavy black smoke.

Q. You said something about a gangplank; where did that lead from?

A. It leads from the ground at that time into the doorway in which I was treating the life preservers.

Q. Was that a means of getting from the boat onto

122 shore, this gangplank?

A. That was one of the means.

Q. What other means was there?

A. There was a gangplank at the other end and you could jump off.

Q. What was the next thing that happened after the smoke filled the room? Just tell us, Mr. Kennedy, if you will, in your own words.

A. Well, I had some idea where I would find Mr. Birkenbuel but the smoke was so dense and bending on the floor I could see his feet and I got over to him. He was unconscious apparently at that time, he didn't make any sound, and there was a wound in his side and his arm was twisted into a mass and I looked then for Tom Desper and about six feet away from Mr. Birkenbuel Tom Desper was lying on his back. One side of his face was crushed in and a gaping wound was alongside of his head, gaping to his brains there.

Q. Before this accident, had Tom Desper apparently been a young healthy man as far as you could see?

A. As far as I could see, he was.

Q. Had he been crippled or deformed in any way?

A. Not in any way.

Q. You may state whether or not he appeared to 123 be a good working man.

A. He was.

Q. I understand he was a pretty big fellow?

A. He was.

Q. All right. What was done, Mr. Kennedy, in an effort to do what could be done under the circumstances?

A. I felt that Mr. Desper was dead because of the manner in which this object had struck his head. There was a gurgling sound and he straightened out somewhat and he was gone, and I got over to Mr. Birkenbuel and I tried to stanch the flow of blood in his side and I wasn't successful and I placed a rope on his arm to stop the flow of blood there and at that time I went to the doorway and called Louis and told him to get some help, an ambulance at least.

Q. After these men had been taken away, did you later have an opportunity that same day to see the container we have called the fire extinguisher, the bronze fittings and the wrench that has been mentioned?

A. I saw the fire extinguisher where I found Tom.

Q. By the way, had something happened to the air hose supplying your equipment when this happened?

A. Well, the brass nut that was apparently loosened until the pressure blew it off, cut the hoses on the 124 air gun that I was using.

Q. You may state if you know whether or not there was pressure, air pressure or gas pressure, inside of this container?

A. To my knowledge it was gas pressure.

Q. Did you examine the container, the extinguisher and the brass fittings later?

A. Yes.

Q. What did you discover about their condition? Will you please tell the jury about that?

A. The nut that Mr. Birkenbuel had had the wrench on had been taken out until a part of the last thread, the pressure from the inside blew the nut out.

The wrench was about ten feet beyond where Mr. Birkenbuel had been using it, buried in the life preservers.

This charging nut had cut the hoses to the gun and it was found up alongside of them, oh, possibly ten feet from the original spot and there were other parts of the extinguisher that were scattered along the floor by the force of the extinguisher gas that had blown out. Directly behind where Mr. Birkenbuel had been kneeling there was splintered deck wood and our conclusion was that the pressure in the—

125 Mr. Shanner: I object to his conclusion.

The Court: You are not allowed to give your conclusions.

By Mr. Davidson:

Q. Where was the extinguisher found?

A. The extinguisher was found lying close by the head of Tom Desper.

Q. If you know, was Mr. Birkenbuel hard of hearing?

A. Extremely so.

Q. Did he use a hearing device?

A. Yes, sir.

Q. Do you know whether he was using it at the time of this occurrence?

A. I couldn't say because that is controlled by the individual under his shirt or some place and I wouldn't know.

Q. How close to him was James Desper when he cautioned him in the way you suggested about the gas escaping?

Mr. Shanner: I object to the use of the word "cautioned," you Honor.

Mr. Davidson: Well, I will reframe the question.

Q. When he uttered the statement you mentioned about gas escaping?

A. Well, he was about six or seven feet.

126 Q. Mr. Kennedy, do you know whether the work went on toward finishing and launching the boats or

was it interrupted for a period after this occurrence?

A. It was interrupted for a period.

Q. Would you know how long, how many days?

A. Almost a week.

Q. Until the funerals and things like that were out of the way?

A. Well, yes, until after Desper was buried and then we worked a very short time and then Mr. Birkerbuel and we had to stop again.

Q. Were you interviewed by an examiner for the United States Government in connection with this matter, Sir?

A. United States Coast Guard.

Q. And did you testify under oath there, also, Sir?

A. No, sir.

Q. I beg pardon?

A. No, sir.

Q. Don't they ask you to take an oath or is that done?

A. No, sir, he didn't, he came out to my house and asked me to tell him what I remembered of the accident. It was not under oath at that time, and I wasn't sworn.

Q. Was that early in June—I don't want to suggest—do you know when it was that he interviewed you, 127 Mr. Kennedy?

A. No, I don't know, it was after the accident.

Mr. Davidson: All right. Thank you. You may cross examine.

Cross Examination.

By Mr. Shanner:

Q. You also testified in a hearing before the Industrial Commission of the State of Illinois, did you not?

A. Yes, sir.

Q. Mr. Kennedy, I believe you said this is the first time that you had ever worked for Mr. Birkenbuel out there?

A. Yes, sir.

Q. Were you under a contract for the job or were you being paid so much a day or an hour, or what?

A. Well, that was more or less a verbal agreement between Mr. Birkenbuel and myself.

Q. I am not trying to find out how much you made, Mr. Kennedy, I wondered if you agreed on a lump sum for that whole job?

A. No, I didn't.

Q. You agreed on so much per day?

128 A. So much per hour until the job was finished.
Q. Then did you pay the man who worked for you?
A. I did.
Q. Mr. Dolan?
A. Mr. Louis.
Q. Mr. Louis, I am sorry.
A. I paid him.
Q. You paid him yourself, as I understand it?
A. Yes.
Q. The work was painting and the work that goes with painting?
A. Yes, sir.
Q. Painting, as you said, and things of that sort?
A. Yes, sir.
Q. Now, of course, you don't know all that Tom Desper did except when he was working for you, do you?
A. No, I can't say.
Mr. Davidson: I object to saying he was working for this man, he was never working for this man.
Mr. Shanner: I didn't mean he was employed by him but when he was helping in the painting, you, of course, knew what he was doing?
A. Oh yes.
Q. Now, he was somewhere else working on an
129 engine or something of that sort and you didn't know, did you?
A. No, I couldn't.
Q. Now, this description, detailed description that you gave of the various objects, well, let us say the top of this container, the nuts and so on, you are testifying to that, of course, from memory?
A. Yes, sir.
Q. When did you examine the extinguisher, they are calling it, to give you the facts that you have been testifying to?
A. I examined it after Mr. Birkenbuel and the body of Tom Desper was removed by studying it orally. The next morning a Deputy Fire Marshal I believe came down and he picked up the different parts and tried to assemble them back in the original way and I was there at the time he was doing that.
Q. Examine them that day, that is the day of the accident, and the next morning?
A. Yes, sir.

Q. At any time since then that you recall?
A. Yes, sir.
Q. When was the last time you saw it?
A. I don't think I can say exactly.
Q. Was it a matter of weeks, months, or last year?
130 A. Oh, I would say it was just a short time ago.
Q. A short time ago?
A. Yes, sir.
Q. How did you see it then?
A. I saw it at 100 North LaSalle Street.
Q. That is Mr. Davidson's office?
A. Yes, sir.
Q. Now, this landing barge or whatever it may be called that you were working in, Plaintiff's Exhibit No. 1, will you hold this out so the jury can see it, and state whether or not that is the landing barge that you were working on?
A. That is it there, the white boat, the long white boat.
Q. Is that in the picture in substantially the same place it was in April of 1948 as far as you recall?
A. Yes, I would say that.
Q. That is in a body of water over there, isn't it, that doesn't show, is that right?
A. Yes.
Q. What is this body of water in there called?
A. I can't tell you the exact name of it.
Q. Do you know whether it is called Edwards' Run?
A. I couldn't say.
131 Q. How deep is that body of water, if you know?
A. It varies, it doesn't have the same depth all the time.
Q. Have you yourself ever measured it?
A. No, sir.
Q. You don't know the depth from actual measurements?
A. No, sir.
Q. You said on direct examination that you thought that this barge was floating; do you know that it was at the time of this accident?
A. I would say that it was resting on water.
Q. And not resting on the bottom?
A. I don't know.
Q. Well, that is what I am trying to get at?
A. No, I don't know whether it was or not.
Q. What did you mean by resting on water?
A. Just what I said. I don't know what you mean.

Q. Oh, you mean it was in the water?
A. That is right.
Q. But it may or may not have been resting on the bottom?
A. It could have been, I don't know.
Q. And those piles you have described, do you know how far they went into the ground?
132 A. No, I don't.
Q. There was one on each side of the boat, was there not?
A. There was one on the side next to the gangplank.
Q. That would be toward the land?
A. And one was on the opposite side and it was not in a downward position.
Q. It was not, just one in a downward position?
A. Yes.
Q. When you were on that landing boat all the time, you were working there before the date of this accident, had it moved any?
A. Not to my knowledge.
Q. And you had seen none of the launches move in the water anywhere at any time up to the time of this accident?
A. No, sir.
Q. Did you see them when they did move out?
A. Yes, sir.
Q. That was in May sometime, was it?
A. It was in May.
Q. Then they went down this railroad over into the Consumers' Run, is that correct?
A. That is correct.
133 Q. Did you see any of them in the so-called Edwards' Run?
A. Yes.
Q. The body of water, that is this little part that appears here, did you see them there that spring?
A. I rode one up to the barge when they hooked onto the floating docks.
Q. Was that just before they moved out?
A. Yes, that is when they were moving out.
Q. Do you know whether or not at that time the dam had been so operated that the water had backed up and raised the water level?
A. It had not to my knowledge.

Q. Well, do you know?
A. At that time?
Q. Yes, I am talking about the time the launch came in there that you are talking about.
A. No, it hadn't been raised.
Q. Was that the same day they moved?
A. No.
Q. Moved the big barge out?
A. No.
Q. How soon before that was it?
A. No, that was three or four days before they
134 moved the big barge.
Q. Now, this room that you were working in, was that shaped roughly very much as this space that the jury occupies, a sort of a rectangular room?
A. Yes, I would say it was.
Q. It was somewhat larger than this, was it not?
A. Very much.
Q. Was it open on the side toward the water?
A. There were stationary—not stationary but little windows they set in there during the winter that they removed in the summer, making it open.
Q. Were the windows in then?
A. Yes.
Q. In on the side?
A. Yes, sir.
Q. How about the side toward the land, was it opened or shut?
A. About half of those storm windows had been removed.
Q. Now, where in that particular areaway were you working?
A. I was in the doorway of the gang-plank.
Q. How near to the doorway of the gangplank?
A. About eighteen inches.
Q. And was that about in the middle of it or was
135 it more toward one end than the other?
A. More toward one end.
Q. How near to the east end was it?
A. About 30 feet.
Q. Thirty feet, and you say the gangway or gangplank was 30 feet, maybe we are not talking about the same thing. I understand you were working not toward the center but toward one end?

A. That is right.

Q. How far from the end of this areaway was it where you were working?

A. Oh, about ten feet.

Q. And where was Mr. Birkenbuel working with reference to where you were working?

A. To one side of me.

Q. How close to you?

A. I didn't measure it but I would say six feet as a guess.

Q. Was he the same distance from the end of the areaway that you were?

A. No, he was farther back.

Q. What I am trying to get at is this: If you assume this was the areaway and you were working about here, was he this way from you or was he this way from you?

136 A. He was this way (indicating).

Q. Going toward the rear of the areaway?

A. That is right.

Q. Was he about the same distance from the edge of—

A. The boat.

Q. The barge that you were?

A. No, he was in back again.

Q. How much farther back in was he than you?

A. I would say 3 feet.

Q. Were you watching him all the time there?

A. No.

Q. How long had he been working altogether with that extinguisher before the explosion that you have described occurred?

A. I couldn't say truthfully because I don't know.

Q. How long did you notice him working there?

A. I would say for about five minutes.

Q. During that five minutes, how much of the time did you observe him?

A. About half of that, about two and a half minutes.

Q. You were watching him for half the time?

A. Well, when I turned around I could see him.

Q. I beg pardon?

A. When I would turn around to pick up something
137 and turned to the side, I would see him, like this (indicating).

Q. How long did it take you to spray a life preserver, would you say?

A. Well, I couldn't say, it didn't take so very long.
Q. You did several hundred of them, I think you said?
A. Yes.
Q. About how long was it?
A. I couldn't say, I didn't time it.
Q. How much time did it take you to spray a preserver as compared to the time it took you to turn around and pick up a tool and turn around?

Mr. Davidson: I object to that, it is reducing it to minutia.

The Court: What is the materiality of this?

Mr. Shanner: I am trying to find out how much he was watching Mr. Birkenbuel.

Mr. Davidson: You have asked that and he answered it.

Mr. Shanner: He said he watched him at the time he turned around to get a new preserver and I was trying to find out how much time it took him compared to the other time.

The Court: How is that material?

Mr. Shanner: He testified to a lot of things he saw 138 there and I just wondered how much he actually saw.

The Court: Oh well, I think you have gone far enough with that.

By Mr. Shanner:
Q. Did you actually see him turning the nuts that you have described?
A. I saw him put the wrench down the last time.
Q. You saw him put it down?
A. Yes.
Q. Was he between a life preserver and you and the fire extinguisher and you or was the fire extinguisher between him and you?
A. He was on an angle, that was why I could see the fire extinguisher and I could see him.
Q. Well, where was the fire extinguisher with reference to him and to you?
A. It was a little, just a little in front of him, to one side.
Q. He was facing which way, toward the doorway or toward the water?
A. He was facing around south and east in the houseboat affair there.
Q. How would that be, or would that be that he was facing toward?

139 A. The corner of the doorway we were working in.
Q. Which corner, the southeast corner?
A. Yes, the southeast corner.
Q. Was that the corner nearest you?
A. Yes.
Q. Then where was the fire extinguisher? Was that right in front of him?
A. Yes.
Q. And the nut that he was working on as he was twisting the fire extinguisher, was that on the right hand side of the fire extinguisher or on the left hand side?
A. It was on the right hand side.
Q. When was it that Tom went over there?
A. When he was told, when his brother James was saying that the cylinder was leaking.
Q. That gas was escaping?
A. Yes.
Q. After that time, Tom went over?
A. Yes, sir.
Q. Did you hear Mr. Birkenbuel ask Tom to come over?
A. No, I did not.
Q. Did you hear anybody?
A. No, sir.
140 Q. Anybody ask Tom to go over?
A. No, sir.
Q. Did you see Mr. Birkenbuel push the wrench just that one time?
A. Yes, just as I turned there.
Q. It was just one movement not all the way around?
A. There was one long movement as I turned around with the preserver.
Q. How long after that did you hear the noise that the thing happened?
Mr. Davidson: Pardon me. You are referring to the explosion?
Mr. Shanner: Yes, sir.
Mr. Davidson: Or the first time, the hissing?
Mr. Shanner: No, I am referring to the explosion.
By The Witness:
A. Well, it was very quick, I would say it was seconds instead of minutes.
By Mr. Shanner:
Q. Now, you made the statement awhile ago that Birkenbuel had unscrewed the nut all up to the last thread,

is that a conclusion you have reached from the fact that the last thread was the one that was damaged?

A. Yes.

141 Q. Just that?

A. Yes, about the way it exploded, yes.

Q. Do you know whether or not, Mr. Kennedy, there were any officers there in the sense of the captain of a ship or a first mate, engineer, anyone of that kind?

Mr. Davidson: I object to that. This man doesn't know from his own knowledge. That would depend on the statutes and the arrangements with Birkenbuel or the company.

The Court: He can state who was there, if he knows.

By The Witness:

A. I don't quite understand the question.

Mr. Shanner: Would you read the question?

(Question read.)

The Witness: You mean outsiders?

By Mr. Shanner:

Q. No, was there a first mate?

Mr. Davidson: I object to that.

The Court: Well, let him put it this way: Who was on there that you knew?

The Witness: Mr. Birkenbuel was on there.

The Court: Who else?

The Witness: And Tom Desper.

142 The Court: Were these the only persons on there?

The Witness: Jim Desper, he asked me for—

The Court: He asked you in substance whether or not there were any officers in the sense of nautical officers who were on the boat at that time.

Mr. Davidson: My objection was this man cannot pass on that question.

The Court: I presume that is what he is going to tell us now. I don't know whether he can or not.

The Witness: It was told to me that Mr. Birkenbuel was a pilot and so was Tom Desper.

By Mr. Shanner:

Q. Were any of them pilot or operator?

A. I believe, if my knowledge is correct, you have got to be a pilot before you can be an operator.

Q. I am not asking you about that; I am asking you if you were told that Mr. Birkenbuel and Mr. Desper was a pilot or operator?

A. No one told me that, no, sir.
Q. I thought you just said it had been told to you?
A. It had been told to me later that they were.
Q. Well, I ask you if you were told they were a pilot or told that they had been an operator.
Mr. Davidson: I submit this has been gone into far
143 enough, your Honor.
Mr. Shanner: He has not answered it.
The Court: He has not said whether he was told they were pilots or operators, you were told which?
The Witness: I believe I was told they were pilots.
By Mr. Shanner:
Q. Who told you that?
A. George Claudnic.
Mr. Davidson: What is the last name? I don't get it.
The Witness: Claudnic.
By Mr. Shanner:
Q. Now, this barge that you were working on at the time and that Tom Desper was working on, do you know whether or not it had any motive power?
A. No, I don't believe it had any motive power at all.
Q. By motive power I mean an engine and boilers, do you know whether or not it did?
A. The barge had none.
Q. Do you know whether or not it had a propeller?
A. I couldn't say that.
Q. Do you know whether or not it had a rudder?
A. I don't know.
Q. Did you see a steering wheel there at any place?
A. No, sir.
144 Mr. Shanner: That is all.

Redirect Examination.

By Mr. Davidson:
Q. Who was that, George Claudnic, I didn't quite hear you? You dropped your voice.
A. Yes, George Claudnic.
Q. Who is George Claudnic?
A. George Claudnic was employed by the ferry company as a machinist, I believe.
Q. Was he one of the men working around there that day?
A. He wasn't with us, he was down on a boat that was being assembled.

Mr. Davidson: Your Honor, I had hoped to have the container here and the attachments to show to this man but they don't seem to have arrived. I wonder if it will be all right with the court, I am through with him otherwise to withdraw him and put another witness on until they get here.

The Court: Yes.

Mr. Davidson: All right, you may step down.

(Excused.)

Mr. Davidson: I wonder if we might let the jury
145 see these photographs now. I intended to at 2 o'clock.

The Court: Yes, sir.

Mr. Shanner: This witness, he tells me, will take quite a long time. I wonder if we could have our afternoon break at this time.

The Court: We will recess at this time for a few moments.

Mr. Shanner: It is all right for the jury to take the photographs.

(Recess.)

146 JAMES DESPER, a witness called on behalf of the Plaintiff herein, having been first duly sworn, was examined and testified as follows:

Direct Examination.

By Mr. Davidson:

Q. Will you state your name?
A. James Desper.
Q. Where do you live?
A. LaSalle, Illinois, R.F.D. 1.
Q. Who do you live with?
A. My mother.
Q. Is her first name Anna?
A. Yes, sir.
Q. Will you please give us your age?
A. Twenty-one.
Q. You are a brother of Thomas Desper, deceased?
A. Yes, sir.
Q. At the time of your brother's death, how old was he?
A. Twenty-two.
Q. Had he been born in the town of LaSalle, Illinois?
A. Yes, sir.

147 Q. Had he lived there all his life?
A. Yes, sir.
Q. What was your brother's apparent general condition of health? In April, of 1948, just before this accident happened?
A. Excellent.
Q. Will you state what the condition was of his eye sight and hearing?
A. Good.
Q. How big a man was he, Jim, will you tell us?
A. Well, he stood about six feet and he weighed about 130 pounds.
Q. What schooling had your brother had?
A. Eight years of grammar school and two years of high school.
Q. What work or educational training did he have after that?
A. He was an arc welder in the Seneca Ship Yards.
Q. Where were they located?
A. Seneca, Illinois.
Q. Do you have any idea how long he worked there?
A. Oh, I would say approximately three years.
Q. What other training or experience did he have?
A. Well, he was a truck driver in the Army.
148 Q. About how long was he in the Service?
A. Well, say a little better than two years.
Q. After he came out of the Service, what kind of work did he start to do?
A. Well, he started as a welder for the Meyer Furnace Company. He broke his foot down there, and after he got out of the hospital he never went back. He quit them.
Q. What work did he next do?
A. Well, next, he went to work for the Starved Rock Ferry Company.
Q. Do you know when he started to work for them?
A. I would say sometime in April, 1947.
Q. By whom was he employed?
A. By Charles Birkenbuel.
Q. Did he work for them during that year?
A. Yes.
Q. From April, 1947, until about when?
A. Well, up until about the middle of December.
Q. Of the year 1947?
A. 1947.

Q. Did your brotner and you both live at home with your mother at that time?

A. Yes.

149 Q. What kind of work did your brother do at the Starved Rock Ferry Company, if you know, during that year?

A. 1947, you mean?

Q. Yes, from April to December.

A. Well, he was a pilot, and general—well, not a handyman, but he did all kinds of work, general labor.

Q. What kind of boats did he pilot for them?

A. Scenic boats.

Q. Do you know if your brother had a pilot's license?

A. Yes.

Q. Do you know about when he got it?

A. Well, I would say some time in June.

Q. Of 1947?

A. 1947.

Q. In the 1947 season, which is the year before this accident, did your brother engage in similar work, that is, fitting out work that he was doing at the time of the accident?

A. Yes.

Q. Working for the same company?

A. Yes.

Q. And after the season, of 1947, and after he got his license as a pilot, did he begin to pilot boats?

150 A. Yes.

Q. Do you know about how long he worked as a pilot for the Starved Rock Ferry Company?

A. Well, since he got his license around the middle of June, up until they quit in December.

Q. Do you know when they began to pull the boats out of the water and store them for the winter?

A. Well, I would say in the latter part of November.

Q. Well, whenever the date was, did your brother help in that work of taking the boats out and preparing them for the winter season?

A. Yes.

Q. Do you have anything to which you can refer to give us the exact date when they began to pull the boats out of the water, or is that just your impression?

A. That is just my impression.

Q. All right. Had you worked for the company, the Starved Rock Ferry Company, during the year 1947?
A. Yes, sir, on Sundays and holidays.
Q. What kind of work did you do for them?
A. Ticket taker.
Q. Did you work below the dam?
A. Yes.
151 Q. And did you work in this boat we have been calling a quarter boat or house boat?
A. Yes, the dock boat.
Q. Where was that boat stationed during the season?
A. At Starved Rock Park.
Q. That has already been described to us as about a half a mile from the dam, below the dam, on the south side of the River.
A. Yes.
Q. Can you explain to us how that operation took place, that is, how did the people get from the shore on to these boats?
A. Well, they had a ramp from the shore out to this large dock boat, and the people came down this ramp and they got on from the dock boat onto the scenic boats.
Q. Did they have to step on to anything in the way of floating barges, or anything that was secured to go from the dock boat on to the scenic launches?
A. No, the scenic boats tied right up to the dock boat.
Q. During the season, do you know what held the dock boat in place below the dam?
A. Cables.
152 Q. Do you know what support it rested on?
A. Well, they had, I think, two spuds they drove in the ground.
Q. One on each side?
A. One on each side.
Q. Was the place where that boat was stationed during the season a part of the main canal of the Illinois River?
A. No.
Q. Where was it stationed down there?
A. Well, it was stationed on the Illinois, but it was south of the main channel.
Q. That is what I had in mind. It was within the banks of the Illinois River, is that right?
A. Yes.
Q. As I understand, the main channel at that point

passed north of an island in the River near there, is that true, sir?

A. That is right.

Q. And this boat was close to the space between the island and the south bank?

A. Yes, sir.

Q. What was the boat used for during the season when tourists were getting rides in these boats; what other
153 service or use was made of the large house boat?

A. Well, they had their work shop on there, and Mr. Claudnic lived right there. He had rooms upstairs.

Q. Well, they had a machine and tool shop on the boat, did they?

A. Well, yes, they had a welder, and so forth.

Q. During the season, was there any use made of the house boat in order to keep the scenic launches in operation?

A. Yes, they used the tool shop and machine shop.

Q. To get the house boat from above the dam where it stood while in winter quarters down to it permanent station below the dam, did they use the locks provided for that purpose?

A. Yes.

Q. Now, when did you learn your brother was going back to work for Birkenbuel, and the Starved Rock Ferry Company, in 1948?

A. Well, one day, I believe it was somewhere around the latter part of February, we were walking up the highway. We were going up to a garage about a mile from our house. We had our car up there, and Mr. Birkenbuel was going towards the south. He stopped and asked my brother if he was coming back to work for him
154 that season.

Mr. Shanner: Now, your Honor, it has been established from the evidence that Charles Birkenbuel is dead. I think that I will object to any conversation that he may have had at that time, at least in February of 1948, to or in the presence of this witness.

The Court: Why isn't that objection good?

Mr. Davidson: Well, it is my understanding that any statements that were made by the managing agent of the defendant, and we will show his status, your Honor, are admissible.

The Court: He has raised the point he is deceased.

Mr. Davidson: I do not think that bars it under the Federal Rule.

The Court: What Federal Rule?

Mr. Davidson: I say there is no Federal Rule that bars that.

The Court: We follow the State Rule, don't we?

Mr. Davidson: I am not so well informed on that, but my associate here advised me there are two cases on that point.

155 The Court: Who advises you?

Mr. Davidson: My associate, Mr. Sullivan.

The Court: Is he an expert on that?

Mr. Davidson: No, I do not think he claims to be an expert. I asked him to look into the question.

The Court: That is something new. We have been going the other way up here. If Mr. Sullivan has some law that shows we are wrong, I would like to be advised.

Mr. Davidson: I wonder if we could submit that to the Court later, and go on with the testimony?

The Court: All right, go on with the rest of the testimony.

By Mr. Davidson:

Q. Now, did you go to work for the Starved Rock Ferry Company in 1948?

A. Yes, sir.

Q. Did your brother Tom start to work for them before you did, or not?

A. Yes, I would say a couple of weeks before I did.

Q. A couple of weeks before?

A. Yes.

156 Q. Can you tell us about what month, or what part of the month, you started?

A. Well, I would say around March 15th, somewhere around there, in the middle of March.

Q. 1948?

A. 1948.

Q. When did you start, about when?

A. Well, about around the 1st of April, or a little later than that.

Q. Who employed you to work there?

A. Charles Birkenbuel.

Q. When did he employ you to come there, Jim?

A. My brother got me the job. He asked Mr. Birkenbuel when he needed another fellow to hire me. After Bill Meyers quit, I went in his place.

Q. Where did you go to work for them? In other words, what place did you go to work?

A. At Buffalo Rock.

Q. What kind of work did you do there?

A. Laborer.

Q. Was the work in general getting the boats ready to place them in the water?

A. Yes.

Q. Did you have directions or instructions from
157 Mr. Birkenbuel or Mr. Claudnic as to when the boats were to be ready?

A. Well, I figured around the 1st of May.

Q. Who gave you that instruction or spoke of it?

A. Well, the boats were all painted and everything and the motors were all in them, all set to go.

Q. Well, I was wondering if you had any definite information. If you don't—

A. No.

Q. You say the work was about done on the boats?

A. Yes, sir.

Q. So far as you know, what remained to be done, sir?

A. All I know, we had to put the license on them. That was the job we had when my brother got killed.

Q. Can you describe the different types of work you did, briefly?

A. Well, I did a little welding, and helping the welder, cleaning up, and so forth.

Q. You were not employed as a pilot at any time by the company?

A. No.

Q. Did you do your work with the other men on the job there?

158 A. Yes.

Q. Who gave you your orders and directions from time to time?

A. Well, if Mr. Birkenbuel was not there, Mr. Claudnic gave us orders.

Q. All right, sir. After you worked there, there came a time when April 26th came along, in 1948?

A. Yes, sir.

Q. Is that the time the accident happened?

A. Yes, sir.
Q. You were there at the time?
A. Yes, sir.
Q. On that day, at the time of the accident, what was the place or location of these ferry boats that customarily operated above the dam?
A. Well, they were up on dry dock yet, or rather on the rails, up on timbering, you know, up on timbers.
Q. Was there a set of tracks, or a marine rail that emptied into the Consumers' Run at that point?
A. Yes.
Q. Were these boats located at intervals along that track?
A. Yes, sir.
Q. You say they were supported on wood or tim-
159 bers of some kind?
A. Yes, timbers.
Q. Was it necessary to move that before the boats got into the water?
A. Yes, we would slide the boats over on dollies, and throw them back into the water.
Q. We have been referring to this little piece of land here. Can you see that from where you sit, this little section of land?
A. Yes.
Q. Were any of these boats we have been talking about on that little neck of land?
A. Yes.
Q. Now, were there any other boats or any other things located on that neck of land at that time?
A. Well, there were two yachts.
Q. Where were they located?
A. Well, at the back side of that, right next to the rail.
Q. Well, the top of the map is north.
A. Yes.
Q. Were they northwest?
A. Well, they were supposed—kind of northeast.
Q. Were they to the left of the rails as you start
160 up from the water or to the right?
A. To the right of the rails.
Q. How large were these boats?
A. Well, I would say they were about 25 or 30 feet.
Q. Who was working on those boats? Was that the Starved Rock Ferry Company?

A. No, the fellow that owned them. They were painting them.

Q. Do you know the owners of those boats?

A. No, I do not.

Q. Were they being readied for use in the water, also?

A. Yes, they were being painted.

Q. Are there any buildings on that neck of land?

A. No. There is an old boat there that Mr. Claudnic used for a garage. I don't know if it is still there or not.

Q. Now, on this day when the accident happened, what were you doing?

A, I was—

Q. About the time it happened.

A. I was handing life preservers to Michael Lewis. He was handing them to the painter, Robert Kennedy.

Q. Did you notice Charles Birkenbuel doing something of an unusual nature just before this accident?

161 A. Yes, he was monkeying with the fire extinguisher.

Q. What was he doing? What did you actually see him doing?

A. Well, I saw him having this wrench on this end, and was trying to take it off.

Q. What did you notice?

A. Then it started like a hissing noise coming out, and I said, "Charlie, you had better turn that back in. It is leaking." And he turned it back.

Q. Let me ask you about it, if you will, so Mr. Shanner will have a chance, if it is necessary, to object.

Q. You were working on the preservers, were you working with some of the other men there?

A. Yes, sir.

Q. Were the preservers being sprayed at that time or being coated with something?

A. Yes, sir.

Q. After you made this remark to Mr. Birkenbuel, what did he do as to the metal nut that he was working on?

A. He turned it back in.

Q. Did you see what happened after that?

A. No. I had my back to him and I was handing the kid preservers.

Q. Did you notice where your brother was at the

162 time of the accident?

A. Well, he was standing back of me. I had my back to him. He was only about two feet or so, I guess, from Charlie.

Q. Were you all fairly close together there?

A. Yes.

Q. Did you see how the thing actually happened?

A. No.

Q. What was the first you knew something unusual had taken place?

A. Well, how do you mean that?

Q. Well, what we want to know is this: we want to know what you saw or heard or notice happen.

A. Well, after that hissing noise, he tightened it back up, then we kept on working there, then I guess he put this wrench back and took the thing off.

Q. You cannot tell what you guess, only what you saw. I want to know if something happened.

A. Well, it exploded.

Q. How do you know something exploded?

A. You could not see anything. The room was all full of dark smoke like, and I ran out of the boat. Mr. Kennedy started hollering "Call the ambulance," that Mr. Birkenbuel had been hurt.

163 Q. Did you hear any sound when this so-called explosion took place?

A. Well, it was like a swish noise, like a lot of air escaping.

Q. Did you come back into the boat after a while?

A. Yes.

Q. You don't have to go into detail. You saw then what was there?

A. Yes, sir.

Q. Do you know the circumstances under which your brother Thomas secured his pilot license?

A. How he secured it?

Q. I beg your pardon?

A. What did you say, how he secured it?

Q. Pardon me. Maybe I did not make it plain. Do you know how your brother happened to go up to Chicago to get his pilot license?

A. Mr. Birkenbuel brought him up.

Q. Did Mr. Birkenbuel go to this place, to the United States Coast Guard?

A. I couldn't say. I did not go with him.

Q. Do you know if those were the arrangements when he came up here?

A. Yes, sir.

164 Mr. Davidson: I think that is all I have to ask this witness, your Honor, except about the matter of the conversation.

The Court: All right.

Mr. Davidson: You may cross examine.

Cross Examination.

By Mr. Shanner:

Q. When you saw Mr. Birkenbuel working with the nut or wrench, was the cylinder in front of Mr. Birkenbuel?

A. Yes.

Q. Was Birkenbuel standing up or kneeling down, or bending over?

A. He was in a kneeling position.

Q. Was he right handed, Mr. Birkenbuel?

A. I believe so.

Q. Using the wrench in his right hand, I mean?

A. Yes.

Q. Did he take two hands, or did he have one holding the cylinder?

A. He had one hand on the wrench.

Q. Do you think it was his right hand on the wrench?

A. Yes, sir.

Q. As he was facing the cylinder, like this is the
165 cylinder here, and I am Birkenbuel, was the nut on Birkenbuel's right-hand side, left-hand side, or was it in front or in the back?

A. It was on the right-hand side.

Q. And in loosening it, which way did he move the wrench?

A. Up.

Q. And in tightening it, which way did he move it?

A. Down.

Q. You saw him move the wrench up first and then down?

A. Yes.

Q. When he moved it up, you heard this hissing?

A. Yes, the hissing noise, and I told him.

Mr. Shanner: I think that is all, your Honor.

Mr. Davidson: That is all. You may step down.

(Witness excused.)

166 GEORGE CLAUDNIC, a witness called on behalf of the Plaintiff herein, having been first duly sworn, was examined and testified as follows:

Direct Examination.

By Mr. Davidson:

Q. State your name, please.
A. George Claudnic.
Q. C-l-a-u-d-n-i-c?
A. That is right.
Q. Where do you live?
A. Route 1, Ottawa.
Q. What is your occupation?
A. Machinist.
Q. Who are you employed by?
A. Starved Rock Scenic Boat Company.
Q. Were you employed by the Starved Rock Company?
A. Yes.
Q. In what capacity were you employed by them in April, 1948?
A. Machinist and boat operator.
Q. You are not working for them now?
A. No.

167 Q. During the winter season, while you worked for that company, in 1947-48, were you in charge of their house boat?
A. Yes.
Q. And in the absence of Mr. Birkenbuel, were you the manager of the place?
A. Yes, sir.
Q. Was Mr. Birkenbuel the President of the Company?
A. Yes, sir.

Mr. Davidson: By leave of Court, we are calling this witness under Section 43 of the Rules of the Federal District Court.

Mr. Shanner: Your Honor, it is true, he was in a sort of manager's position at the time, but he is not now. I have tried to find something on that, but I cannot. I do object, though, to calling him under the provision of the Rule because now he has no official connection whatever with the defendant in this case.

The Court: He had at the time.

Mr. Shanner: He had at the time.

The Court: The objection is overruled.

168 By Mr. Davidson:

Q. Mr. Claudnic, following this accident on April 26th, 1948, did you have in your possession the cylinder that had contained the gas at the time of the accident?

A. Well, it was in the company's possession, not in mine.

Q. I am trying to find out where the cylinder has been, Mr. Claudnic.

A. It has been on the barge.

Q. Did it remain on the barge from the time of the accident?

A. Yes.

The Court: Is there a difference between this boat you call the house boat and the barge, or are they the same?

Mr. Davidson: We have been using the different names, so perhaps it is confusing. When you say the barge, you mean the house boat or the quarter boat?

The Witness: Yes, sir.

The Court: They are the same thing?

Mr. Davidson: Yes, sir.

Will you mark this Plaintiff's Exhibit No. 6 for identification?

169 (Said document was marked Plaintiff's Exhibit No. 6 for identification.)

By Mr. Davidson:

Q. I would like to show you the metal cylinder which has been marked Plaintiff's Exhibit No. 6 for identification, and ask you if that is the empty cylinder on which Mr. Birkenbuel was working at the time of the accident?

A. Yes, it is.

Q. So far as you know, is it in the same condition now as it was at the time of the accident?

A. Yes.

Q. Except for such changes as handling might cause?

A. Yes, sir.

Q. Until when was it on this barge, until what time?

A. Until yesterday or last night.

Q. Did you give possession up to some one at that time?

A Yes, sir.

Q. Who came to get it?

A. Mr. Herbolsheimer.

Q. The attorney from LaSalle that is in this case?

A. Yes, sir.

Q. You gave it to him?

170 A. Yes.

Q. Does it appear to be in the same condition now as when you gave it to him?

A. Yes, sir.

Q. We haven't these others marked with tags, but I would like to show you a round brass object. What would you call that?

A. Well, it looks like a cap.

Q. A cap or nut, I think it has been described as a nut. You call it a cap. You are referring to an object that has a metal portion with red plastic?

A. Yes, sir.

Q. And it has a small heart-shaped figure with the number 50 on it, is that correct?

A. Yes, sir.

Q. Was that a part of the fire extinguisher?

A. I think so.

Q. Well, you had it in the box for a couple of years?

A. It was picked up, and it was all put together.

Mr. Davidson: Will you mark this Plaintiff's Exhibit 7 for identification?

(Said item was marked Plaintiff's Exhibit No. 7 for identification.)

171 By Mr. Davidson:

Q. Do you know whether this next object I have picked up, a round piece of metal with a spring like attachment on one side, is that also a part of this extinguisher?

A. Yes, sir.

Mr. Davidson: I will ask to have that marked Plaintiff's Exhibit 8 for identification.

(Said item was marked as Plaintiff's Exhibit No. 8 for identification.)

By Mr. Davidson:

Q. What about this small object I am holding in my hand now, also round, with a black ring inside. Is that a part of it?

A. Yes, sir.

Q. And what about this piece which we will mark Exhibit 9? What about this little piece of metal, is that part of it?

A. I don't know. I found it in there. I don't know whether it is a part of it or not.

Q. Now, this carton, is that the carton that the fire extinguisher came in?

A. Yes, sir.

Q. As I understand it, the company purchased five
172 of them at the time?

A. Yes, sir.

Q. Is this the first one that was being opened?

A. Yes, sir.

Mr. Davidson: I wonder, your Honor, before I begin to question this man further about the occurrence, if the Court could grant us a few minutes to discuss this other matter of this other evidence.

The Court: Why don't you go ahead with him?

Mr. Davidson: All right.

By Mr. Davidson:

Q. Mr. Claudnic, as I understand it, you occupied this house boat the year around, is that correct?

A. Yes, sir.

Q. And at the time of this occurrence, the house boat was located in a stretch of water known as, I believe, Edwards' Run, is that it?

A. Yes, sir.

Q. Do you know how much of a draft that house boat had?

A. Two feet.

Q. You have lived in that neighborhood for a number of years, have you?

173 A. About nine.

Q. Were you familar with the use that the craft were making of this stretch of water called Edwards' Run, and of the other water on the opposite side of the neck of land where the boats were, which has been called Consumers' Run?

A. I did not quite get that.

Q. Let me see if I can put it in another way, if you will bear with me for a moment. There was a stretch of water called Consumers' Run at that point, is that true?

A. Not where this barge was, no.

Q. Is there a stretch of water known as Consumer's Run at the place I am showing you here on the map, Mr. Claudnic?

A. Yes, sir.

Q. This is the Illinois River. You understand the map?

A. Yes, sir.

Q. There is one channel, and there is another, is that right?

A. Yes, sir.

Q. And there are the two stretches of water I have spoken of?

A. Yes, sir.

174 Q. Now, this one there on the left as we face the map, on the northwest, is known as Consumer's Run?

A. Yes, sir.

Q. And the one on the right is known as Edwards' Run?

A. That is right.

Q. I am trying to find out from you what craft used the west fork.

A. Well, we ran our boat, the tug boat to the barge.

Q. The tug boat you refer to is the one operated by a pilot, is that right?

A. Yes, he is classed as a pilot. He is not a regular pilot. He is not a licensed pilot.

Q. It is a boat that is piloted on the waters of the Illinois River, is that correct?

A. Yes.

Q. Is that a power driven tug boat?

A. Yes, sir.

Q. Had you seen that tug boat from time to time before the date of this accident, in April, 1948, moving laden barges, barges filled with gravel in them, up that Consumers' Run to points where they were being unloaded?

A. Yes.

175 Q. Was that the regular practice there for a period of several years?

A. Yes.

Q. At the time of this accident, were there two yachts also resting on that neck of land between these two sections of water?

A. Well, they were resting in Consumers' Run.

Q. Were they in the water?

A. Yes.

Q. Do you remember when these two yachts were placed in the water?

A. No, I cannot give you the date, because we put them in there, and we never kept track of the date.

Q. Did you put them in before the accident?

A. That I cannot say.

Q. Before they were placed in the water, had they been on the neck of land where the ferry boats were?

A. Yes, sir.

Q. Now, in conducting its business at that time, that is when the season was in operation, did the Starved Rock Ferry Company keep a number of these ferry boats above the dam?

A. Yes, sir.

Q. How many, sir?

176 A. Four.

Q. Did they maintain any similar ferry boats below the dam?

A. One.

Q. These ferry boats that were above the dam carried how many passengers?

A. On carried fifty-five, one carried ninety, and two of them carried 85.

Q. Had Thomas Desper, Jr. acted as a pilot operating these launches before this accident, in the year before?

A. We never had no pilots.

Q. We will call them operators. Is that what you called them?

A. Yes. There is a lot of difference.

Q. In order to operate those boats, a man had to have a license from the United States Coast Guard, is that true?

A. Yes, sir.

Q. You were an operator of these boats also, am I right, sir?

A. Yes, sir.

Q. Did you also have a similar license?

A. Yes, sir.

Q. Now, I would like to know if it is the fact that

177 Thomas Desper, the young man who was working for the Starved Rock Ferry Company, operated one or more of these ferry boats in 1947?

A. Yes.

Q. Did he operate any one of the four, or did he have a specific boat assigned to him?

A. Well, there was no special boat assigned to anybody.

Q. During the year, when he worked for the company, in 1947, before the season began, did he help with the outfitting and preparation work of these boats such as he was doing on the day he was killed?

A. Yes.

Q. Do you know it to be the fact, sir, that Thomas, immediately after he got his license from the United States

Department of Commerce to operate motor boats carrying passengers for hire, that he was placed at work doing that kind of work for the Starved Rock Ferry Company?

A. Yes, and also other work.

Q. I beg your pardon?

A. He had to do other work just the same.

Q. Well, he was kept permanently employed throughout the season, was he not?

A. Yes, that year.

178 Q. What I have in mind is this. There were other men who worked only Saturdays and Sundays when the trade was the heaviest, is that true, sir?

A. Yes, sir.

Q. Mr. Desper worked for the company throughout the whole of the week?

A. Yes.

Q. Did he work every day, including Saturdays and Sundays?

A. Not always.

Q. Did he get a day off during the week?

A. Yes.

Q. Was that a specific day?

A. No, it was staggered.

Q. Did he ever work operating these boats below the dam in the Illinois River?

A. No.

Q. Now, when he operated these boats above the dam, were these boats operated in the River itself?

A. Yes, sir.

Q. Where did they start their run from?

A. From the dock.

Q. Did they start from the head of the stairway which was used by passengers who wanted—

179 A. It was a dock above the dam.

Q. Was that on the north side or the south side of the river?

A. It was north.

Q. How did they get from below [redacted] dam up to this dock?

A. They walked a ramp, a private ramp by the ferry company.

Q. Then those passengers who wished to take a tour or trip would board the boat in the first place down at the landing where the house boat was stationed, is that right?

A. Yes, sir.

180 Q. From there they were transported in some larger ferry boat over to this stairway at the north side of the dam at the dam?

A. Yes.

Q. Who operated that large boat?

A. Myself.

Q. That boat carried about how many people?

A. Well, the capacity of the boat was 150 passengers, but we only carried the amount that the next boat would carry that was available above the dam.

Q. What was the draft of that big boat?

A. Two feet.

Q. What was the length of that launch?

A. I think it was 61 feet.

Q. These ferry boats we have spoken of that were above the dam had how much draft?

A. About 2½ feet.

Q. Their length varied within what range?

A. They were from about 55 feet to 60, approximately.

Q. Can you give us the tonnage of these boats above the dam?

A. One is 9, two of them is 11, and the other one is 5.

181 Q. Five tons?

A. Yes, sir.

Q. What is meant when you speak of the tonnage of a boat?

A. The displacement.

Q. What was the tonnage of the big boat, 61 foot or below?

A. Fifteen.

Q. Now, did you have any other floating equipment used by the company?

A. Yes, sir, we had barges.

Q. Tell us about the barges, Sir?

A. Well, we have one barge below the dam to transfer the passengers and one above the dam, and one at the canyon dock, also the big barge, the houseboat that was at the park proper.

Q. After you had transported the passengers from the big barge or houseboat, as you call it, from the dock, and the passengers had proceeded to the upper dock, they were then taken in one of these four ferry boats on their tour upstream, is that right?

A. Yes, sir.

Q. That was how long a trip in the Illinois River?

A. The complete trip was about an hour and
182 twenty minutes.

Q. Did the trip extend up into some of the more interesting canyons that the company wanted to show the people or that they wanted to see?

A. They have not in the last five years. They have all filled in the canyons; and we stayed right in the river.

Q. You stayed right in the Illinois River?

A. Yes.

Q. Now, was the river, during the season, in the early fall, used by other traffic?

A. Yes.

Q. What type of boats were plying the river at that point?

A. The point we ran down was mostly these small cruisers.

Q. Any other type?

A. Ours was all.

Q. Any commercial vehicles?

A. No.

Q. Carrying pay loads?

A. No.

Q. What type of cruisers do you have reference to?

A. Just private cruisers, pleasure craft.

183 Q. In operating on the Illinois River there, were you required to observe the regulations of the United States Coast Guard for the operation of your craft?

A. Yes, sir.

Q. Were you operating under their jurisdiction?

A. Yes, sir.

Q. And in order to get an operator's license, as you describe it, did you have to take certain training and tests?

A. You have to learn how to run a boat.

Q. I beg your pardon?

A. You have to learn how to run a boat.

Q. I assume that, Mr. Claudnic, but I would like to know a little more about it. Did you have to get certain instructions as to what your duties as a pilot were if you met other craft coming from the opposite direction?

A. Yes.

184 Q. Were any of your boats operated after sunset?

A. Well, about twice or three times a year.

Q. Well, during the summer season, I mean?

A. Yes.
Q. That is a special trip you made somewhere?
A. A special trip, yes, sir.
Q. Just a party?
A. A party, yes, sir.
Q. Were you given instructions by the government with respect to any night operations?
A. Yes, sir.
Q. Did you have the regulations of the Coast Guard that you were required to observe with reference to running lights?
A. Yes.
Q. Were your boats so equipped?
A. Yes, sir.
Q. When you had business, when people were there to be taken on these trips, did Mr. Desper operate these boats above the dam?
A. Yes.
Q. You said something about his doing other work, do you mean that when there wasn't any necessity for carrying people in the boats he did other maintenance
185 work?
A. Yes, sir.
Q. Was the maintenance work he did on the ferry boats?
A. On the ferry boats, on the bank, anywhere there was anything to be done.
Q. What was his principal job there at that time when the season was going and the people were riding the boats?
A. Well, he was supposed to be an operator, an operator whenever we needed him.
Q. Did you tell Desper, give any instructions in the operations of the boats?
A. At times, yes.
Q. Do you have any personal knowledge of the depth of Consumers Run?
A. It is around 5 feet.
Q. Five feet?
A. Yes.
Q. Do you know what the depth is at the deeper portions of Edwards Run?
A. It ain't over two feet at the deepest.
Q. Did you see or ever hear of the LaCrosse Dredge & Dock Company?
186 A. Yes, sir.

Q. Did they have a large dredge they kept in Edwards Run?

A. One season, yes.

Q. What season did they keep it there?

A. In the winter of '47.

Q. Where did they keep it in Edwards Run?

A. Right by our barge.

Q. That is the houseboat you are talking about?

A. Yes, sir.

Q. When you say right by it, do you mean attached to it?

A. No, just enough you couldn't step across between ours and theirs.

Q. Was it kept next to the bank?

A. Pretty close.

Q. It was farther in than the houseboat, was it not?

A. Yes.

Q. Will you describe that large dredge that was kept there that season?

A. Well, it was a single story.

Q. Several stories?

A. Single, one story affair, about 35 feet in width, about 120 feet in length, about 5 feet in depth. It 187 drawed about 3 feet of water.

Q. Did you ever see that dredge used to do any dredging in Edwards Run?

A. Yes.

Q. When was that done?

A. In the winter of '47.

Q. What were the circumstances under which they happened to dredge that out, if you know?

A. Well, they wanted to come in there and winter and we also wanted to deepen our channel out a little bit so we could get in and out.

Q. How deep did they make the channel in the winter of '47?

A. About 4 feet.

Q. When did they do that, do you know?

A. In the winter, wintertime.

Q. How far down did they dredge down to 4 feet?

A. Oh, about 600 feet.

Q. That took it past the houseboat, is that right?

A. No, up to it.

Q. Didn't they dredge themselves in far enough so they could go in?

A. No, they pulled themselves up to the bank.

Q. How did the dredge move, did it have motive
188 power of its own?

A. No, they moved it with spud bars and cables.

Q. Did they push it with a boat, a tugboat?

A. They had a small tugboat but you couldn't push it in there.

Q. That dredge was moved there and used along the river before it moved in, was it not?

A. Yes, sir.

Q. After it finished wintering there it went out again?

A. Yes.

Q. Do you know what it was used for in the river?

A. They used it for dredging parts out and dredging at different spots.

Q. In the river?

A. Yes.

Q. Was that the only season they kept it there, the winter of '47?

A. That is the only time.

Q. Do you know how long that channel remained in that condition?

A. Well, I couldn't tell you exactly but it was filled up in the spring when we had to go out.

Q. Were there any other barges attached to the
189 houseboat when it stood there during the winter?

A. Two small barges.

Q. Did they float on the water?

A. Yes.

Q. What about the houseboat?

A. Sometimes it is floating and sometimes it is on the bottom.

Q. When you moved that houseboat in, is it moved in by means of one of these ferry boats that we have been talking about?

A. Yes, sir.

Q. And when it is pulled out in the spring, is it pulled out by the same means?

A. Yes, sir.

Q. Have you ever found it necessary to use a regular tugboat for that operation?

A. You can't get it in there.

Q. Have they ever used a regular tugboat for that operation, for part of that operation?

A. We have after we got it out in the river.
Q. A tugboat was used to pull it down?
A. Yes, sir.
Q. Whenever they tow barges in Consumers' Run, do you know whether there is one or more tugboats going
190 up Consumers' Run?
A. Just one.
Q. Have you seen the operation where the loaded barges are loaded over at the island with gravel and then they push them up Consumers' Run?
A. Yes.
Q. When the ferry boats move off that neck of land they use Consumers' Run to do it?
A. Yes, sir.
Q. Can you tell us, if you know, Mr. Claudnic, how far in you go in Consumers' Run to get to the point where the gravel pits are located and the clam shells and the other equipment of the company?
A. You mean from our ways?
Q. How far from where you enter the mouth of that area?
A. Oh, it is a good thousand feet.
Q. Is there any obstruction separating Consumers' Run from Illinois River?
A. There is just a channel cut in through there.
Q. What I have in mind is this: When the dam affects the level of the river, does that at the same time affect the level of the water in Consumers' Run?
A. Yes.
191 Q. Is the same also true in Edwards' Run?
A. Yes.
Q. You did not see the accident itself, did you, Mr. Claudnic?
A. No.
Q. At the time of the accident, as I understand it, a number of these ferry boats were standing on the marine rails; is that right?
A. Yes, sir.
Q. Were all of them on the marine rails except the new boat that was being built?
A. Yes.
Q. What kind of new boat was being built?
A. We was just rebuilding one of the old ones.
Q. What was being done actually, on that boat?

192 A. We were widening it and replacing it with steel, replacing the decking with steel.

Q. Was there much more to be done on that boat that was being rebuilt?

A. Quite a bit.

Q. The other boat that just had the usual seasonal repairs on rehabilitation, those boats were substantially ready for use, were they not?

A. No.

Q. Were those boats due to be used about May 1st?

A. Yes, sir.

Q. They had all been painted, hadn't they?

A. Not quite, I don't think, I don't think they were all quite finished then.

Q. Well, Mr. Kennedy was the man doing the painting, wasn't he?

A. Yes.

Q. And the motors were in the boats?

A. Yes.

Q. Those had been checked, had they not?

A. Well, they had been looked over but they weren't ready to run.

Q. How much more work did you have?

A. Well, I would say it was only about three-
193 quarters completed.

Q. How much more work did you have there in point of time?

A. About three weeks.

Q. Did the boats go into the water three weeks after the accident?

A. Yes, about, approximately three weeks after.

Q. There was about a week or so when no work was done after the accident, isn't that true?

A. Just a couple of days but I kept busy all the time, I was working.

Q. You, yourself?

A. Yes, sir.

Q. There was no substantial help there for a week, was there?

A. A few fellows were there.

Q. Prior to—now, Tom Desper, Jr., when the boats were ready to go into the water in this season of '48 was going to be taken on as a pilot, was he not, or as an operator, as you call it?

A. That I don't know.
Q. You don't know?
A. No.
Q. How many pilots or operators had you had the 194 previous season?
A. We had two besides myself.
Q. Give us their names, will you, Sir?
A. I think the following year we had Bob Smith.
Q. That is the year before, you mean?
A. Yes.
Q. All right.
A. Bob Smith and I can't think of the man's name now offhand.
Q. Was there a Mr. Meyers?
A. Mr. Meyers only worked part time. I don't recollect his name right now.
Q. I wish to ask you if you don't know it is a fact that Mr. Birkenbuel re-employed Thomas Desper, Jr. to help get the boats prepared for operation in 1948 and then to go out and work as an operator when the boats were in the water?
A. Yes.
Mr. Davidson: That is all.
Mr. Shanner: I have quite a few questions, your Honor. Do you want to start?
The Court: At this time we will take a recess until 10:15 o'clock tomorrow morning.
(Whereupon a recess was taken to 10:15 o'clock a. m. of the following day, Friday, April 21, 1950.)

195

IN THE UNITED STATES DISTRICT COURT

(Caption—No. 49 C 481)

Before Judge Igoe and a Jury,
Friday, April 21, 1950,
10:15 o'clock a. m.

Court met pursuant to adjournment.
Parties Present:
Mr. Ryan,
Mr. Davidson,
Mr. Sullivan,
Mr. Shanner.

196 The Clerk: Case No. 49 C 481, Anna Desper, Administratrix of the Estate of Thomas J. Desper, Jr., versus Starved Rock Ferry Company, on trial.

The Court: Proceed, gentlemen.

Where are we in this case? Are we ready to cross examine?

Mr. Davidson: I wonder if I may ask a few more questions of the witness on direct or on cross examination?

The Court: Yes, sir.

GEORGE CLAUDNIC, called as an adverse witness on behalf of the Plaintiff herein, having been previously duly sworn, resumed the stand, was examined and testified further as follows:

Direct Examination (Resumed).

By Mr. Davidson:

Q. Mr. Claudnic, George Claudnic?

A. Yes.

Q. This fire extinguisher that you were shown yesterday came to the Starved Rock Ferry Company about how long before this accident?

A. Well, I might say about a month.

Q. About a month?

197 A. A month or four weeks, I don't know exactly, I couldn't say exactly.

Q. Were these five fire extinguishers in their own carton container like the one located here in the court room?

A. Yes.

Q. Were the containers placed in wooden boxes or in a wooden box when they arrived at the company office?

A. Yes.

Q. And was this one which was involved in the accident the first one that was being opened to be placed in operation?

A. Yes.

Q. Now, where were these fire extinguishers purchased from by the company?

A. As far as I know they were purchased from surplus, from some surplus company.

Q. Well, they were U. S. Army surplus, is that correct?

A. That is right.

Q. Do you know what effort was made by the company to find out what pressure was in these fire extinguishers?

A. No, I don't.

Q. Do you know whether the company secured any
198 directions or instructions as to how to use them?

A. No, I don't.

Q. By the company I include Mr. Birkenbuel, you understand that, do you not?

A. Yes.

Q. Weren't you, at that time, in April, 1948, the acting superintendent?

A. Yes.

Q. As well as the foreman there?

A. Yes.

Q. Were you also the general manager at that time?

A. No.

Q. Well, you had been with the company as a machinist, boat operator and general manager, isn't that true?

A. Well, yes, it was the last I was general manager but during the time that Mr. Birkenbuel was there he took care of the operation. Only in his absence was it that I took his place.

Q. You mean you became general manager after his death?

A. Yes, sir.

Q. Prior to that time you were superintendent and foreman?

A. Yes, sir.

199 Q. I see. Now, this gas cylinder had considerable carbon dioxide gas in it, did it not? Do you know that now, sir?

A. Well, it was supposed to have been charged up.

Q. What do you mean by charged up? Will you please explain that to the Court and jury?

A. It was supposed to be full for use, filled.

Q. And what was it going to be used for?

A. We was going to install them in the boats for fire extinguishers.

Q. Were you going to place one of these or more than one of these in each of these launches?

A. We was going to put one in each.

Q. Was it the plan to place one of these cylinders in each launch, to connect them up with piping leading to various outlets in various parts of the launch?

A. That was the general idea, yes, sir.

The Court: You use the word "launch" and the word

"ferry," are they both the same?

Mr. Davidson: Answer the Court's question, Mr. Claudnic.

The Witness: Yes, sir, it should be the same.

The Court: All right.

200 By Mr. Davidson:

Q. Those ferry boats were about fifty feet long, approximately, more or less, is that right?

A. Yes, sir.

Q. So that the gas had to have sufficient pressure in these cylinders, if the necessity arose, in order to use them in that fashion, as the gas was released it would go with sufficient force through the pipes to these various outlets in the boat, is that so?

A. I think so.

Q. And the design was that the carbon dioxide gas would be propelled into the boat and smother a fire if one broke out, is that right?

A. Yes, sir.

Q. You knew that a cylinder of that type had considerable pressure of gas back in it, did you not?

A. I thought it did.

Q. Do you know if it is a fact that there was approximately 800 per pounds per square inch pressure, I think 840 pounds per square inch pressure in those tanks?

A. No, I didn't know how much there was, no, I couldn't.

Q. Did you ever confer with Mr. Birkenbuel about how those were to be put in there, at any time before he began to try to remove one of the bolts?

201 A. No.

Q. Now, there were two other men that worked there, a man named Kennedy and his helper, named Lewis, in doing the readying work on the boats, is that right, sir?

A. He was supposed to do the painting.

Q. Painting, and his helper, Kennedy and his helper were not there on the same basis as Tom Desper was, is that true?

A. Yes.

Q. That is, Kennedy and Lewis, these men, were brought in to do the painting?

A. Yes, sir.

Q. When they were through they were going to be discharged, is that correct?

A. That is right.

Q. I should not say "discharged," but when they finished painting and the readying work, there was no more work for them?

A. They were just contractors for the painting job.

Q. They were not operators of the boats, were they?

A. No.

Q. They hadn't worked for the company and sold tickets or took tickets or anything like that?

202 A. No.

Q. Is there a railroad leading to that channel used by the Consumers Company?

A. Yes.

Q. Does the Consumers Company, after bringing this crushed rock, through their process, as gravel—

A. Just a minute there, the railroad doesn't run to the Consumer's channel, no.

Q. Does the railroad lead to that channel of the Consumers Company at all, or near it?

A. Near it.

Q. Does it service the Consumers Company?

A. Yes.

Q. That is what I had in mind. It runs on a track across the back end of that channel?

A. Yes, sir.

Q. On dry land?

A. Yes, sir.

Q. That channel itself is a navigable channel, is it not?

Mr. Shanner: Which channel?

Mr. Davidson: The Consumers' channel.

By The Witness:

A. For their own use, yes.

203 By Mr. Davidson:

Q. Have you described it yourself on a previous occasion as a navigable channel leading back to the Consumers Company, is that right?

A. Yes, sir.

Q. Was there a custom and practice at that time, on the Illinois River, to your own knowledge, for some miles up and down from where this occurred, in this general area, of using operators on those boats prior to the time the boats were actually placed in the water to do the readying work on the boats?

A. I don't quite—I don't quite get it.

Mr. Davidson: Will you read it to him, please?

(Question read.)

Mr. Shanner: That, if the Court please, I object to. I may not understand the question correctly.

The Court: Apparently the witness doesn't understand the question either. Ask another question.

Mr. Davidson: All right, your Honor.

By Mr. Davidson:

Q. Was there a custom and practice on the Illinois
204 River, around and about the Starved Rock area and other points up and down the River for a number of miles whereby the persons who were going to operate these small boats, once they were placed in the water, assisted in the preparation and readying of the small boats?

Mr. Shanner: That I object to, if the Court please, if it calls for any custom of other boats of other companies, which I assume that it does. I have no objection to any custom of this particular defendant.

Mr. Davidson: I am including general practice, your Honor.

Mr. Shanner: Then I object to it.

The Court: How is this defendant bound by what might prevail with other companies up and down the River?

Mr. Davidson: Because I believe the Courts, in determining whether a man is a seaman when engaged in doing the readying work, decided he was a seaman, have considered what the custom and practice was, your Honor.

Mr. Shanner: I don't know of any case, your Honor, where the Courts have held that.

205 The Court: You folks are kind of generous mentioning cases each time you make a point but where have you got a case like that?

Mr. Davidson: I will have to refer to my notes.

The Court: Your assistant isn't here?

Mr. Davidson: No. It will take a little time, Judge, to go through these cases, there is quite a number, but on that particular point I think we have authority for it.

The Court: I will sustain the objection for the moment and later on you can look it up and see if you can find it.

By Mr. Davidson:

Q. Let me limit it to your company.

Mr. Claudnic, was there a custom and practice that your own company was operating under at that time where you

used some of the operators to help ready the boats for use during the coming season?

A. Yes, if available.

Mr. Davidson: All right, that covers it, your Honor.

The Court: What was his answer?

Mr. Davidson: "Yes, if they were available."

By Mr. Davidson:

206 Q. Now, Tom Desper was on the regular payroll there, was he not?

A. As far as I know, yes.

Q. Well, you had some idea what was going on in that business, Mr. Claudnic?

A. Well, a man worked today and something went wrong tomorrow and he didn't want to do his work, he would naturally let it go, you couldn't say that he could not.

Q. Mr. Claudnic, you knew what the various men were doing around there, whether contractors or regular operators or in what capacity they were working for the company, didn't you?

Mr. Shanner: Perhaps because you say "regular payroll"—

Mr. Davidson: I am trying to use the man's own language, that is all.

Mr. Shanner: Where did he use the word "regular payroll"?

Mr. Davidson: Page 33.

By Mr. Davidson:

Q. Except for Kennedy and Lewis, the helper, weren't the other men there on the regular payroll?

A. Well, at that time, yes.

207 Q. Now, what was Mr. Desper's wages at that time, Tom Desper's?

Mr. Shanner: Now, you mean in 1948?

Mr. Davidson: That is it.

By Mr. Davidson:

Q. Do you have a record of what his wages were in 1948?

A. Yes, we have our books here, yes.

Q. Will you please refer to them, Mr. Claudnic? I think I saw them laying on the table with the fire extinguisher.

Mr. Shanner: They gave them to the Marshal for safe keeping, Judge.

The Court: Now, you will have to find the Marshal.

By Mr. Davidson:

Q. Suppose you take the book for 1947 first, Mr. Claudnic.

Now, will you give us the date when Tom Desper started to work for the company in 1947 and the date when he stopped working for them in 1947?

A. In 1947 he started—

Q. Look at April 3rd and tell us if that is the correct date?

208 A. Started April 3rd.

Q. 1947?

A. 1947.

Q. And he worked until what date?

A. Worked until December 19th.

Q. December 19th?

A. Yes, sir, just a minute, excuse me, I have got this wrong.

Q. Will you look at the 10th, I think it was the 10th myself?

A. Yes, December 10th.

Q. And what was his rate of pay?

A. $1.10.

Q. A what?

The Court: $1.10 per hour?

Mr. Davidson: $1.10.

By The Witness:

A. Per hour.

By Mr. Davidson:

Q. Will you give us some illustration of the amount of his pay checks, he was paid every two weeks, is that true?

A. Yes, sir.

Q. The amount of his pay checks, take the begin-

209 ning of the season that you have there, the middle of the season when they were running the boats, and the end when they were cleaning up the work.

A. The first pay check was $96.85.

Q. That was $96.85 paid on what date, do you know?

A. That would be April 16th.

Q. Can you run through a number of them without much trouble here?

A. On May 16th, that was $114.40.

Q. $114?

A. Yes, sir.

Q. Drop the cents, just give us the dollars and drop the cents.

A. $114.

Q. What was the next pay check and the date?

A. July 16th, it was $133.

Q. You have skipped a number of pay days, have you?

A. Yes.

Q. $133?

A. Yes, sir.

Q. What about the next pay day, after July 16th?

A. That was June.

Q. June 16th?

A. June 16th.

210 Q. What was the next pay day?

A. June 30th would be $143.

Q. 143?

A. Yes, sir.

Q. For two weeks?

A. Yes, sir.

Q. The next pay day was July what?

A. $149.

Q. $149. Does that fairly represent the way it continued to run while the season was going and the boats were in operation?

A. For just about two months and then it dropped down.

Q. For how many months?

A. About two months.

Q. Maybe I can look at it with you. When were the boats in the water, from when to when that year, do you know?

A. From June 1st.

Q. June 1st?

A. June 1st, that would be for the first two weeks in June.

Q. Mr. Claudnic, let me get something else. The boats were in the water from June 1st, 1947, until when, un-

211 til the end of October?

A. Until the end of October.

Q. Let me run down these pay checks with you, maybe we can save a little time; the first pay check for June 21st was $133?

A. That wouldn't be June 21st, that would be up to

the 15th, that would be his check on the 16th.

Q. Is the next pay check around July 5th?

A. No.

Q. It doesn't show what pay check?

A. No.

Q. It shows he worked during that period, is that true?

A. Yes, sir, his pay check would be drawn on the 16th.

Q. The next pay check was $149, and is the next one $134, the next one $129, is that right, sir?

A. Right.

Q. The next $143, $122 going into September 20th now, is that right?

A. $107.

Q. $113, you are into October, $140 in October. All right, that gives us a pretty good idea I think, Mr. Claudnic.

212 Was it the usual practice of the company to take back the operators that they had had the season before?

A. If they were available, yes.

Q. How long would it take to get those boats in the water, one boat, any one of the four or five that were on the marine railway, once they were ready to be launched?

A. Once they were ready to be launched, that would be a matter of five or six minutes.

Q. All right, sir.

Well, to do the work from taking them off the timbering they were on, and putting them on the dock and getting them down into the water and launching them with the men you had available, that could be done in a couple of hours, could it not?

A. Oh, yes, it involved a few hours.

Q. Could it be done in a couple of hours?

The Court: What is the difference between a couple of hours and two hours?

Mr. Davidson: Did you say "two," I am sorry?

By The Witness:

A. It depends on how many men you have. If you had one man it would take you all day, if you had five
213 or six men it would take you maybe an hour. It depends on how much help you have there.

By Mr. Davidson:

Q. With the men available there to do the work, is it

fair to say it could be done in a few or a couple of hours' time?

A. Well yes, it could be done in a couple of hours time.

Q. Wasn't the work that remained to be done, just the installing of the fire extinguishers and the reconditioning of the life preservers, wasn't that all that was needed at that time?

A. When?

The Court: At the time of the accident.

By Mr. Davidson:

Q. At the time of the accident.

A. Why, no, we had a lot of work on the boats beside that.

Q. Were these life preservers going to be used on the ferry boats as well as on the big boat down below the dam?

A. Yes.

Q. Were the life preservers equipment that had been used on those ferry boats the previous season?

214 A. Yes.

Q. Just reconditioned?

A. Yes.

Q. Would those boats go on chartered trips up and down the Illinois River, other than these small trips?

Mr. Shanner: By those boats, you mean which boats?

By Mr. Davidson:

Q. Referring to the ferry boats.

A. No, not all of them.

Q. Well, did you use some of those boats on charter trips as far as Ottawa, LaSalle and Peru on the Illinois River?

A. We used one.

Q. Has the channel of the River, the Illinois River, been changed since April, 1948?

A. Since 1948, I don't think so.

Q. Did the channel of the River, the main channel, originally pass around to the north of the hump?

A. North of which?

Q. Did the main channel of the River previously pass around to the north of the hump or the horn, as it has been called here, to the north of the islands in the River?

215 A. Yes.

Q. Wasn't that changed since April 26th, 1948, when they dredged through there and opened it up?

A. I wouldn't say for sure what date it was in but they dredged it, yes, they dredged it across the mouth.

Q. Just to refresh your memory, you testified at another hearing, at an Industrial Commission hearing, where you were asked this question about the operation of the River, and did you make this answer:

"Question: Now this channel you refer to as the Consumers' channel, what comes in and out of there?

"Answer: They push gravel in and out of there.

"Question: By tug boats from the river?

"Answer: No, they have their own shallow draft tugs, they just come across the river and they have got barges across the river on the island and they dredged a canal there and load it on the barges and bring it from there in the barge into the plant and then they load it there."

That is just preliminary to direct your attention to it.

216 A. Yes.

Q. "Question: Now, in the main channel of the river there is a great amount of boat traffic, is there not?

"Answer: Pretty fair, but it is changed now.

"Question: What do you mean by that?

"Answer: The river has been changed from where that used to be, on the same side of the channel, and they have put a cut-off in there.

"Question: They put a cut-off in there?

"Answer: They put a cut-off in there, yes, sir; that has been since April 26th, 1948?

"Answer: That is right."

Does that refresh your recollection, Mr. Claudnic?

A. Yes, sir.

Q. As far as your recall, in other words, was the main channel of the River, at least up until April, 1948, around the north side of those islands at that site?

A. That is before that cut-off was put through there, yes.

Q. Since then, I suppose, the Army Engineers have dredged through there and boats can now pass down

217 on the south portion of the channel, is that right?

A. Yes.

Q. Now, the north portion of the channel is still there, is it not, the part that goes around the horn?

A. Yes.

The Court: What do you mean, "around the horn"? Is that around Starved Rock?

Mr. Davidson: No, north of those islands there, your Honor.

The Witness: It is north of those islands.

By Mr. Davidson:

Q. In order to operate those ferry boats, is it necessary that you receive authority from the Coast Guard and that you carry Master's papers on the boat?

A. Yes.

Q. Those charter trips that I spoke of up and down the River run as far as a distance of ten miles each way, is that true?

A. Yes.

Q. Do you know how long Kennedy was there after this accident, do your records show that or do they not?

A. No, we kept no records of his time.

Q. May I see that?

A. Because he kept his own time, he paid his own 218 man, we just paid him a lump sum.

Q. Let us see if we can find this in the book, Mr. Claudnic. By the way, these are the books you brought in under a subpoena duces tecum?

A. Yes, sir.

Q. Served on the company?

A. Yes, sir.

Q. In other words, Kennedy wasn't on the payroll book?

A. No.

Q. I see, then he won't show in there. All right. Can you finish up with Tom Desper for 1948? Let us get the date, if you can give it to us when he started to work for the company. Will you look at March 15th, I believe.

A. He started March 15th.

Q. 1948?

A. 1948.

Q. And worked until the day of the accident?

A. Yes.

Q. Did he work steadily during that period? Just as he had the year before?

A. Well, he had some occasional days off.

Q. Well, he worked—when he was working there, 219 do you know what the days off were for?

A. Well, he took two days off, he took the 19th and the 20th of March off, that was Friday and Saturday and he was off the 27th, on a Saturday.

Q. Did he work five days in the next week?

A. He worked, he didn't work Thursday—no, wait a minute, he worked only one hour on Saturday, the 3rd of April.

Q. You had a Decoration Day week end in there, didn't you, right at the point you are looking at now?

Mr. Shanner: A Decorat on Day week end.

The Witness: That would be May.

Mr. Davidson: That would be May.

The Court: May 30th.

The Witness: From then on he worked steady.

By Mr. Davidson:

Q. Worked steady beginning as of when?

A. The last time he was off was the 17th of April.

Q. Was that the last day he had off?

A. He was off then, that was on a Saturday and that is all he was off until the accident.

Q. What was the rate of pay that year, per hour, 1948?

A. $1.20.

Q. $1.20 an hour.

220 Mr. Davidson: I am through, your Honor.

Cross Examination.

By Mr. Shanner:

Q. That was $1.20 per hour?

A. Yes, sir.

Q. Now this Consumers' Channel, that Mr.—first of all the railroad that you have referred to, Mr. Davidson referred to, you were not talking about the little rails in the boat yard?

A. No, no.

Q. Does the other railroad show on this map, the railroad that you were talking about? Where was this thing, back here or up here?

Mr. Davidson: We had it here, that is it.

By Mr. Shanner:

Q. Stick your hand down here. Is the railroad here, that is the Consumers around here, does that show on that map?

A. No.

Q. That is the Chicago, Rock Island & Pacific?

A. Yes, sir.

Q. Is there another railroad?

A. There is a spur comes in here and comes across here and runs through the site.

221 Q. Is that a continuation of this line that is labelled "Chicago, Rock Island & Pacific Railroad;" "Mining Railroad"?

A. That is right, yes, sir.

Q. This map then is not accurate on showing the railroad, where it actually goes?

A. No.

Mr. Davidson: Indicate with your hand just that point.

Mr. Shanner: Well, he did.

Mr. Davidson: Did he show that?

By Mr. Shanner:

Q. Will you show again about where that railroad went to?

A. There is a spur comes in across.

Q. What railroad is that, do you know?

A. That is a spur from the Rock Island.

Q. Now that Consumers' Run that you testified about, what is the fact as to whether or not that is dredged?

A. That Consumers' channel?

Q. Yes, sir.

A. Yes, they dredged it themselves.

222 Q. How frequently is it dredged?

A. About every other year.

Q. Now, there was some testimony about a dredge or dredge boat coming into Edwards Run. When did it come in?

A. In the winter of 1947.

Q. Can you say by winter what you mean?

A. Well, it came in there about the third week or around the second week, I think, in December.

Q. Of 1947?

A. Yes, sir.

Q. How did they get into Edwards Run?

A. Well, they used the clamshell and they clammed out and through the dirt on the side.

Q. What is a clamshell?

A. A clamshell is just like a bucket, like a shovel.

Q. Well, in short, do they, with their dredge, dredge their own path to get in there?

A. Yes, sir.
Q. How far into the run did they go?
A. I would say about 600 feet.
Q. Where did they end up with reference to where you had your landing barge anchored?
A. Up to our landing barge.
223 Q. Up to there?
A. Yes.
Q. How long did the barge remain in there?
A. Until the spring of 1948.
Q. Can you say about when in the spring?
A. I think it was around the middle of June.
Q. Was it there when this accident happened? Was the dredge there?
A. Yes.
Q. When the dredge went out of there, how did it get out, if you know?
A. They had to pull themselves out.
Q. How did they pull themselves out?
A. They used cables and deadmen, and worked their way out, by using cables on winches to drag themselves through the mud.
Q. To what was the cable attached?
A. To a deadman out by the river.
Q. To a what?
A. A deadman.
Q. What is a deadman?
A. Well, that is a big concrete or big timber buried down deep with a cable around it that comes up on top, then they put their pulleys on it, and thread the cable
224 around it to tie it up; in other words, like an anchor.
The Court: You attach your line to it, don't you?
The Witness: Yes, sir.
By Mr. Shanner:
Q. You had a winch on the dredge, is that right?
A. On the dredge, yes.
Q. By that winch winding up, it pulls itself out with the cables, is that it?
A. That is right.
Q. Now, when or about when did you come up to the Buffalo Rock Boat Yard in 1947?
A. I would say about the first week of November.
Q. When you came up there in the fall of 1947, how

many employees of Birkenbuel remained on the payroll, after you came up to the Buffalo Rock Boat Yard?

A. Well, I could not say that right now offhand without looking at the record.

Q. Would these books here show?

A. Yes, sir. There were four.

Q. How long did these four remain on the payroll?

A. They were only on there a few weeks.

Q. Then who was on the payroll during the balance of the winter?

A. Myself.

225 Q. You testified, I believe, that Tom Desper came to work on the 15th of March, 1948?

A. Yes, sir.

Q. Did the others come around that time, or were they appreciably before or appreciably after?

A. Well, after.

Q. And, as I understand it, you were the only one on the payroll during the winter up until around the middle of March?

A. Yes, sir.

Q. What did you do during the winter with reference, I mean, to the operatings of the defendant in this case?

A. Not much of anything. There was a little shop work around. I would tinker around the motors a little bit. If I had any, I brought them into the shop and monkeyed with them, just as the weather permitted, just monkeying around most of the time, not very much.

Q. When you came out in the winter, that is when the launches were brought up, and the landing barge was brought up, what was done with the various equipment, and the boats and the barges?

A. Well, when we brought the boats up, we would pull them out, one at a time, and we would scrape the bottoms off, clean off the barnicles and the growths 226 that grows on the bottom of them, clean them up and wash them up and pull them upon the ways and block them there.

Q. When you say pull them on the ways, what do you mean, on the track?

A. On the track.

Q. And they stay on the track, do they?

A. They stay on the track.

Q. How did you get the landing barge up there in November or the latter part of October in 1947?

A. We brought it up with our boats.

Q. How did you get it into Edwards Run?

A. Well, when we leave the dam, we notify the dam personnel, and they raise the upper pool sufficient to float our barge in.

Q. Did they do that upon this occasion?

A. Yes, sir.

Q. In the fall of 1947?

A. Yes, sir.

Q. How much did they raise the level of Edwards Run so that you could get in there, if you know?

A. Oh, approximately about eight inches.

Q. Then how did you get in? What means of locomotion did the barge itself have?

227 A. Well, we pushed in with our own boat.

Q. Now, when you take that out in the spring, and down to the dam, what is the procedure then of getting out of Edwards Run?

A. We just reverse the procedure. We call up the dam personnel and make arrangements for it, and weather permitting, why, we try to notify them long enough in advance so that they can hold their pool up to give us a chance to get out. And after we get in and get out of the bay, we notify them, or they see us coming down the river, and they start dropping the pool back to normal.

Q. What if anything do you do, in bringing the landing barge in Edwards Run, and in taking it out, what if anything do you do in the way of plotting a course for it in the run?

A. Well, we had to do that every spring, and in the fall before you can come in. We have a rowboat, and we go out there with stakes, and we feel around for the depth, and any obstructions that should happen to come in, and we stake a course out to be the easiest possible way to get in, just like if you stake out a road down through a field somewhere, and we would follow those stakes to get in.

228 Q. How deep is Edwards Run, or was it in April of 1948?

A. About two feet.

Q. How do you know the depth of it?

A. We measure it twice a year.

Q. How would you measure it?

A. Go out with a stake.

Q. Does the depth of it vary?

A. Oh, sometimes it may vary a little bit, maybe an inch or so, but I should say mostly it is pretty flat.

Q. What is the condition of Edwards Run itself with reference to any vegetation or growth of weeds?

A. Well, there are a lot of weeds growing east of where we have our barge.

Q. What if any boats or vessels of any kind use Edwards Run?

A. None.

Q. Any small boats, such as rowboats?

A. Oh yes, rowboats can come in.

Q. How about boats with outboard motors?

A. Well, you have to be pretty careful with them.

Q. Well, do they use it or don't they use it?

A. Sometimes they come in there, but most of the time when they come in, if they are not very careful
229 and go very slow, they will always hit some obstruction or some stakes, and they would shear their sterring pin loose, and lose their wheel.

Q. Now, this landing barge, about what were the dimensions of that, the length and breadth?

Mr. Davidson: Is this the houseboat now you are talking about?

Mr. Shanner: Yes, sir.

By The Witness:

A. Well, about 26 feet wide and about 110 feet long and about 16 feet high, a two-story affair.

By Mr. Shanner:

Q. What kind of bottom does it have?

A. Flat.

Q. Of what material is the bottom?

A. Wood.

Q. How much of a draw does it have?

A. Two feet.

Q. What is on the inside of the landing barge?

A. Well, we have a waiting room, offices, shops, a heating plant, a storeroom, and upstairs we have an apartment where we live. The rest is for a warehouse.

Q. What is the fact as to whether the landing barge has any means of propulsion?

230 A. No.

Q. Does it have an engine of any kind?

A. No.

Q. Does it have a propeller?
A. No.
Q. Does it have a handle?
A. No.
Q. Does it have any steering apparatus?
A. No.
Q. Does it have a whistle?
A. No.
Q. Or a bell?
A. No.
Q. Does it have a crew?
Mr. Davidson: Well, that is something that would be a question—
Mr. Shanner: I will withdraw the question, your Honor.
Mr. Davidson: I am not objecting to the question except on the ground it is immaterial and irrelevant in this kind of a case.
The Court: Well, he has withdrawn it, so there is not anything to argue about.
Mr. Davidson: All right, I will withdraw my ob-
231 jection, your Honor.
The Court: All right, you start out even.
By Mr. Shanner:
Q. During the year 1948, did any employee of the defendant, the Starved Rock Ferry Company, work steadily all of the time or even most of the time on this particular landing barge?
A. Well, not steadily, no.
Q. Which of the employees was on it the most?
A. Myself.
Q. You, in fact, lived on it during the winter, did you not?
A. Yes, sir.
Q. The living quarters you spoke of were for yourself and your wife?
A. Yes, sir.
Q. And in the summer, did you live there?
A. Yes, sir.
Q. During the season when you were down at Starved Rock Park, the operating season, did Tom Desper have any duties on this landing barge?
A. Well, if there was any help to do in cleaning up.
Q. Any help to do what?
A. Cleaning up. You always have cleaning up.

232 Q. He might do it?
A. He might do it, yes.
Q. Did this landing barge have a name?
A. No.
Q. Or a number?
A. No.
Q. And did it have any papers or certificates of any kind from the Coast Guard?
A. No, sir.
Q. Or from any other department or instrumentality of the Federal Government?
A. No.
Q. Now, when it was brought up to Edwards Run in the winter of 1947, toward the fall of 1947, rather, how was it anchored or whatever the expression should be?
A. In Edwards Run?
Q. Yes.
A. We pulled it up to the bank, and we dropped two spud bars, one on one corner and one on the opposite corner, on the opposite ends of the barge, on the opposite corners of the barge.
Q. What is a spud bar?
A. A spud bar is a big steel cylinder, a long cylinder pipe with a point on the end of it, and it goes down
233 through another pipe which is fastened permanently to the barge, and then travels down, and the point goes into the bottom of the river bed.
Q. Up there in Edwards Run, about how far did it go into the bottom of the river bed?
A. It would sink in there six or seven feet down in the mud.
Q. What is the fact during the winter of 1947 and 1948, up to April of 1948, as to whether these spuds were in the ground in the manner you have described?
A. Oh yes.
Q. Were they picked up at any time or pulled up or lifted at any time during the winter or spring of 1948?
A. The only time we lifted them was when we were ready to move down to the park.
Q. How and in what manner otherwise was there a connection with the shore?
A. Well, we tied a few cables around—one cable we would tie to a tree, in case of a windstorm, to hold the barges to keep them from hammering, if a wind started, and we have water connections and electrical connections.

Q. With the land?

234 A. With the land, and fuel oil connections.

Q. With the land?

A. Yes, sir.

Q. Does the landing barge itself have any means of generating electricity?

A. No.

Q. Or pumping water?

A. Yes, with the electricity, we have our own pumping system.

Q. With the electricity that comes from the outside?

A. Yes.

Q. How long have you lived down in that vicinity, Mr. Claudnic?

A. I have lived on that barge for approximately nine years.

Q. Well, had you lived—

A. Ten, now.

Q. Had you lived in Ottawa or vicinity before that time?

A. I have lived all my life in LaSalle County.

Q. Do you remember when the dam was built down near Starved Rock Park?

A. Yes.

Q. When was it completed?

235 A. It was completed in 1933, I think it was. Now, I would not be exact on the date.

Q. Now, before the dam was completed, what is the fact as to whether this body of water which is here marked Edwards Run was there?

A. No.

Q. What was there?

A. Just a creek. A creek ran through there.

Q. Did the creek come down to the edge of the river?

A. It went to the river, yes.

Q. So the north bank of the river then came along something like this?

A. Yes.

Q. I am indicating by drawing a line from the lower end of Edwards Run across to the lower end of Consumers Run. Is that correct?

A. Yes, sir.

Q. What was there where Edwards Run is now?

A. Farm land.

Q. Now, Mr. Davidson asked you some questions about

launches complying with the regulations of the Coast Guard, such as carrrying running lights at night. What is the fact as to whether you have any regulations from the Coast Guard to be complied with during the time that
236 the landing barge and the launches are up in Edwards Run during the winter season?

A. No, we have none.

Q. Those regulations are observed only during the operating season, after you move down near the dam?

A. Yes, sir.

Q. You stated in your answers to Mr. Davidson's questions that there was a difference between a pilot and an operator. What is the difference?

A. Well, a pilot, his license only runs for certain sections of the navigable channel, and any stretch of water he is familiar with, and had worked with another licensed captain for so many years.

An operator's license—any individual can get an operator's license provided he knows how to run a boat and can read the rules and regulations and answer questions. He carries passengers for hire. That is good in any district.

Q. When you say provided he knows how to run a boat, what kind of a boat?

A. Motor propelled.

Q. Now, was Tom Desper a pilot or operator?

A. He was an operator.

Q. Did the work that you were doing at Buffalo
237 Rock Boat Yard during the month of April, 1948 require any kind of license from the Coast Guard or the Department of Commerce or any other department of the federal government?

A. No.

Q. Now, is Consumers Run that there was so much testimony about connected in any way with Edwards Run?

A. No.

Q. Are they or are they not separate bodies of water?

A. Yes.

Q. About how much distance is there between the two?

A. Well, they meet at the river's edge.

Q. These fire extinguishers that you were contemplating using, do I understand they were to be used only on the launches and not on the landing barge?

A. That was my understanding.

Q. The life preservers that Mr. Kennedy was spraying, where were they to be used?

A. They go into these ferry boats.
Q. They go into the launches, too?
A. Yes.
Q. Were either the life preservers or the fire extinguishers used or to be used on the landing barge?
A. No.
238 Q. Now, as I understand it, you did not see this accident?
A. No, I did not.
Q. Where were you at the time?
A. I was on the other end of the yard, working on a boat.
Q. The first you knew of it was when somebody came and called you?
A. When they notified me.
Q. Now, do you know of your own knowledge what the terms of the arrangement between Mr. Birkenbuel and Mr. Tom Desper for work that spring or that summer that he was to work were?
A. No, I do not.
Q. So far as you know, were any of the employees of the Starved Rock Ferry Company employed for any specific time like for a month or a year or for a season?
A. Well, that is pretty hard to say.
Q. What I mean is this, Mr. Claudnic, as far as you know, were any of the employees under contract for a certain time?
Mr. Davidson: By contract, you mean of employment?
Mr. Shanner: Contract of employment.
By The Witness:
239 A. Not that I know of.
By Mr. Shanner:
Q. So far as you know, the employment could be terminated or could have been terminated by Mr. Birkenbuel at any time?
Mr. Davidson: That is not the fact, as I understand it. He might fire a man.
Mr. Shanner: That is it.
The Court: Well, go ahead.
By The Witness:
A. No, I would not know.
By Mr. Shanner:
Q. Now, after this accident, and after the death of Tom Desper and Charles Birkenvuel, as I understand from your testimony, you sort of took charge?

A. Yes, sir.

Q. What is the fact as to whether there was an office on this landing barge?

A. Yes.

Q. Is that where these books, for instance, that you have in your hands, were kept?

A. Yes, sir.

Q. Did you, after the death of Birkenbuel, examine the papers that were in the office there on the barge?

240 A. Yes.

Q. Do you know of any other office of the defendant company?

A. No, sir.

Q. Will you state whether or not you found any seaman's papers for Tom Desper or for any other employee?

Mr. Davidson: I will object to that, that characterization of documents.

The Court: The objection is sustained.

Mr. Shanner: I thought we had established—seaman's articles, I should have said, not seaman's papers.

Mr. Davidson: I object to the legal description. This man would not be qualified to pass upon that.

The Court: He can say what papers he found there.

By Mr. Shanner:

Q. All right. What papers did you find there?

The Court: But to designate them such as you have, that is another question.

By The Witness:

A. Well, I found the time books.

By Mr. Shanner:

Q. Is that what you have in your hand?

241 A. Yes.

Q. What else?

A. The regular ledger and checks was all there was.

Q. Did you find any licenses or anything for the operation of the motor launches?

A. No.

Q. Where are those kept?

A. They are kept on the boat.

Q. On which boat?

A. On each boat, on each individual boat.

Q. Did you find any papers, or will you state whether you found any papers of any kind pertaining to the employment of Tom Desper?

A. Just what is in the time book.
Q. That is that book you have there?
A. Yes, sir.
Q. The book you have been reading from, and Mr. Davidson was looking at over your shoulder, is that correct?
A. Yes, sir.
Mr. Shanner: I believe that is all, your Honor.
The Court: Anything further?
Mr. Davidson: Yes, your Honor.

242 *Redirect Examination.*

By Mr. Davidson:
Q. Do you know of your own knowledge whether seamen operating these small boats up and down the Illinois River are ever given seaman's articles or have seaman's articles?
A. I have never seen any.
Q. Wasn't it your understanding as superintendent of the company there that Thomas Desper was hired for the season of 1948?
A. Well, there was nothing definite so far as I was concerned.
Q. I say, wasn't it your understanding there? Didn't you believe that he was hired for the season?
Mr. Shanner: Wait a minute. I am going to object to that.
The Court: Objection sustained to what he believes. He can state what the facts are.
By Mr. Davidson:
Q. Well, did you have any understanding about the nature of his employment for your company?
A. No, we had no understanding.
Q. Did you have any knowledge or understanding as to whether he was on a day-to-day basis or hired
243 through the season?
A. Well, a man could leave at any time he wanted.
Q. Sure, a man could quit his job at any time. If he wanted to work, he was hired for the season, wasn't he?
A. Well, that is something I could not say because I did not hire him. If Mr. Birkenbuel found something that went wrong and he wanted to get rid of him, he could.
Q. Well, I mean if the man did his work satisfactorily,

and went on doing his work satisfactorily, he was hired for the season?

Mr. Shanner: Well, the witness has answered that.

Mr. Davidson: Why don't you let him answer?

Mr. Shanner: He has answered that.

Mr. Davidson: Not this one.

By the Witness:

A. He probably would be.

By Mr. Davidson:

Q. Mr. Claudnic, I will show you this photograph. I will hold it up so that the jurors can see it. I am indicating the north edge of the Illinois River as it flows toward the west.

A. Yes, sir.

Q. Now, isn't it a fact that this point of land which 244 marks the most southerly point of land, on which these boats are, is north of the north edge of the river itself?

A. It practically runs in a semicircle.

Q. Don't the two bodies of water, that is, Edwards Bay, or whatever you call it, and Consumers' Run, don't they merge about the same time they get to the Illinois River?

A. Yes.

Q. Edwards' Run was deeper at the point where the stream came flowing into it, was it not, from the north end?

A. That is something I cannot say.

Q. Have you ever tested it for its depth?

A. We never had any occasion to be up there.

Q. Do you know how deep Edwards' Run is when it gets out near the Illinois River?

A. About up to your knees.

Q. Do you know that the two-foot depth you have spoken of is the same as where this houseboat stands on the photograph—

A. Practically all the way up.

Q. Was that depth something that varied at different times of the year, in the spring of the year, for 245 example?

A. Well, it will vary a few inches in the spring of the year when you have floods. It will naturally come up maybe a foot.

Q. Does the height of the Illinois River vary at different times, the river above the dam?

A. Well, when you have a flood down below, it will raise a foot, yes.

Q. The river does not always stay at exactly the same level twelve months of the year, does it?

A. Not exactly, no.

Q. And it may vary more than six or eight inches during the year, may it not, that close to the dam?

A. Well, up close to the dam, it is kept pretty even.

Q. I am talking within distance, within range—

A. Well, within the distance—the farther you go away from the dam, the fluctuation would be different.

Q. As a matter of fact, after closing up the dam, sometimes in fifteen minutes, the water raises in Edwards Bay, does it not?

A. If you have a lot of water coming down, yes.

Q. The raise is only about eight inches to let your houseboat float in freely?

A. Approximately eight inches, yes.

246 The Court: If you have several more questions, we will take a recess.

(Recess taken.)

Mr. Davidson: Will you mark this Plaintiff's Exhibit 11 for identification?

(Said document marked Plaintiff's Exhibit 11 for identification.)

By Mr. Davidson:

Q. Mr. Claudnic, counsel asked you whether, at the time you were on shore there with these boats, whether you were attempting to comply with any regulations of the Coast Guard. Now, as a matter of fact, Sir, didn't you have to satisfy the requirements of the Coast Guard with reference to safety requirements?

A. Not while we are in winter quarters.

Q. I understand, but I say, in getting your boats ready for use, you would prepare these boats so that they would meet and pass the requirements of the Coast Guard so that they could be operated in the water?

A. Yes, sir.

Q. Wasn't that a part of the reason that this fire extinguisher, like others, was to be prepared and readied for the use on these ferry boats?

A. Yes.

247 Q. Was the same also true of the work actually being done at the time of the accident by these men, where the treatment by preservatives was administered

to the life preservers so that they would be suitable for use and available on the ferry boats?

A. Well, it was to preserve them so that they would not rot.

Q. Well, you were trying to place your equipment in first class condition for use in the waters on the Illinois River?

A. Yes, sir.

Q. Now, you spoke about living on the houseboat. You were away from there a month or so every winter; you did not stay right there during the winter?

A. No, I went out on a vacation.

Q. Now, Mr. Desper, himself, Tom Desper, Jr., in doing that work, from March 15, 1948 until April 26th, worked on these boats, did he not, the ferry boats that were standing on the marine rail?

A. Yes, sir.

Q. That is, he helped ready the equipment on the boat, or the equipment to go on the boat, isn't that true?

A. Yes, he was helping me whatever there was to

248 be done.

Q. Helping you?

A. Yes.

Q. This operator's license you spoke about to counsel qualifies a man to operate a power-driven boat of a certain capacity anywhere on the navigable waters of the United States or on the ocean shore, is that right?

A. I think so, yes.

Q. You said an operator has to read the rules and regulations. What rules and regulations are you referring to?

A. The Coast Guard has a book they use that you have to study up on, about the safe manner of operating and lights and equipment and passing signs that you have to know.

Q. In other words, just like a man who would want to run an automobile on the highway has to learn the rules of the road the same would apply to an operator who is going out where boats are?

A. Yes, sir.

Q. He has to be prepared to operate under various conditions, whether favorable or adverse, is that true?

A. Yes, sir.

249 Q. And that applies to the man who is going to

have the care and safety of passengers on boats, is that right?

A. Yes, sir.

Mr. Davidson: That is all.

Mr. Shanner: If I may just ask one more question, your Honor.

Recross Examination.

By Mr. Shanner:

Q. Mr. Claudnic, directing your attention to this portion of the Illinois River that runs straight here that has the dotted line in it that is marked "Sail."

A. Yes.

Q. I am referring to this map of the Department of the Army Corps of Engineers, and it is numbered 52. To refresh your recollection, do you recall whether or not Charles Birkenbuel was alive when this southern portion was dedicated or used by traffic on the Illinois River?

A. No, I cannot be positive.

Q. Do you know of your own knowledge when that was first used for shipping on the Illinois River, the southern part?

250 A. I know it was used in 1948, in the summer of 1948.

Q. Do you know whether it was used in 1947?

A. I am not positive.

Mr. Shanner: I think that is all.

Mr. Davidson: Just one more thing.

Redirect Examination.

By Mr. Davidson:

Q. You testified here before this court and jury yesterday, Mr. Claudnic, and I want to ask you if you did not state at that time you knew it was a fact that Mr. Birkenbuel re-employed Thomas Desper, Jr. to help get the boats prepared for operation in 1948, and then to go out and work as an operator when the boats were in the water?

A. He might have hired him—

Q. Didn't you testify to that last night just before court adjourned?

A. I probably said yes, but I still did not have the hiring of him.

Q. Have you discussed that phase of your testimony with anybody since you have been here on the witness stand?

A. No, not that.

251 Q. Where did you go after you left the court house last night?

A. I went and got in the car and went out north.

Q. Where did you come this morning when you came downtown?

A. I went over and stopped to see Mr. Shanner.

Q. The lawyer representing the defendant in this case?

A. Yes, sir.

Q. Did you discuss that question with him?

A. We talked about different things, but I would not say positively whether we discussed that one thing or not.

Q. I call your attention to your testimony—

A. He may have said something but I cannot be sure. I cannot say for sure.

Q. Have you changed your mind about this since last night?

A. No.

Mr. Davidson: That is all.

Recross Examination.

By Mr. Shanner:

Q. Mr. Claudnic, you have talked to me, and also talked to Mr. Davidson out in the hall, didn't you?

252 A. Yes, sir.

Q. And you talked with Mr. Herbolsheimer on several occasions?

A. Yes, sir.

Mr. Shanner: That is all.

Redirect Examination.

By Mr. Davidson:

Q. You say you talked to me out in the hall. You spoke to me yesterday and let me see these books, isn't that true?

A. Yes, sir.

Q. Did you discuss any part of this case with me?

A. I think you only asked me what time Tom Desper started and when he quit.

Mr. Davidson: All right, you may step down.

(Witness excused.)

(Discussion between court and counsel, not transcribed.)

253 Mr. Davidson: We have a map here, your Honor, which I will offer in evidence as Plaintiff's Exhibit No. 1. It is a large map of the area in question. In view

of the proof now in, I believe the document is competent. I am offering this large map, including the area above and below the dam.

Counsel raises an objection because this showed the course of the main stream north of the island. Now, I think this witness has testified to his recollection that the stream at that time did not pass north of the island, and that sometime around then or shortly afterwards, it was moved to the south.

I want to say for the record we are not making any point about it ourselves, whether the main course was north of the island or south of it, because the river flows through both places. We desire to offer the map to show the docks, permanent objects and their location with other things which have been spoken of.

Mr. Shanner: What is the number of that?

Mr. Davidson: No. 11.

Mr. Shanner: The defendant objects to the admission of Plaintiff's Exhibit No. 11, your Honor. I do not question that it is a map from the Army Engineers; that is, 254 I do not ask that it be certified or anything like that, but this map on its face shows it was made in 1936. This accident happened in 1948, twelve years thereafter, so it is a matter of common knowledge to your Honor and to Mr. Davidson and to me that there were many changes in that particular portion of the Illinois River in these intervening twelve years.

Of course, it is well to establish the authenticity, that is the accuracy of the map, and I think, in the absence of any proof, that the map correctly portrays the River and that area as it was in 1946, it should not be admitted; and I object to it.

The Court: Well, what I don't understand, where is Starved Rock on this map here?

Mr. Davidson: It does not show, your Honor; this map shows it.

The Court: How?

Mr. Davidson: It would be down in this direction, down to the south of the River bend; in here. The dam comes in here several miles down, and it is below the dam where the main bed would be.

The Court: This is all above the dam?

Mr. Davidson: This is all above the dam several miles.

255 The Court: At this big circle in the River, they just cut off to shorten the route?

Mr. Davidson? Yes.

The Court: Is it your contention that that part is not navigable after they did that?

Mr. Shanner: No, except it is not used for navigation.

The Court: I know. Whether it is used for navigation or not, does not decide whether it is navigable or not.

Mr. Shanner: This map that is in apparently explains the situation that was in existence in 1948. Now, he is offering another map that is quite different.

The Court: In what respect?

Mr. Shanner: Well, look at it.

The Court: It shows the situation there before the cut-off.

Mr. Davidson: It was always open through there. Both of these had always been open. They just dredged it and made it straight. I do not think there is any very substantial difference, myself.

The Court: All right, where is that on this map?

Mr. Davidson: Right in here.

The Court: Where is the cut-off, now?

Mr. Davidson: It runs right straight through there
256 and then on down the River.

The Court: Instead of going way around through there, you come through here?

Mr. Shanner: As I understand it, there are several changes here. I think it was Mr. Claudnic who testified they used to go through here on with their little launches.

The Court: What difference does that make?

Mr. Shanner: I don't know. He brought it out.

Mr. Davidson: I am not making any point of that.

Mr. Shanner: Well, you brought it out.

Mr. Davidson: I just want to show where the dam is, where the lower River is.

Mr. Shanner: We have another map that goes with that, to show where the dam is.

Mr. Davidson: You have to piece three of them together to show it.

Mr. Shanner: You have to show two. This is the official map in 1936.

The Court: It is a map of the United States Engineer's?

Mr. Shanner: Yes, sir, in 1936, and I object to it, because there is no foundation laid that it accurately portrays—and in fact, it does not, your Honor, portray the

physical situation as it existed in 1948.

257 The Court: Well, outside of the cut-off, where is the difference?

Mr. Shanner: Well, I was telling you, there was a difference down here. These canyons are all pretty well filled in now.

The Court: How are they involved in this law suit?

Mr. Shanner: Well, it is not material. He said he wants it in to show that.

The Court: No, he wants it in to show the dam.

Mr. Shanner: I suppose he wants to show where these boats would ply at the time they are entering a navigable stream.

Mr. Shanner: That is up here. This is all different.

Mr. Davidson: They come down here and go right up the River.

Mr. Shanner: The little launches come down from here. He has brought in evidence how they come up into this place. He went into that at considerable length. I have no objection to any map showing the condition that existed in 1946, but I do object to a map that is twelve years old. There have been a number of changes.

The Court: Do you have another map that fits in with this?

258 Mr. Davidson: I have two more. One shows down here and another one shows down here. I am not saying how far they go. Is the man who drew the map here?

Mr. Sullivan: Yes, he is.

Mr. Davidson: Let us put him on the stand to have him explain it. We have the man here that can tell. I don't know how long he has been with the Department.

The Court: He cannot show the changes that are going to help you out about the navigation.

Mr. Davidson: He can explain what those changes were.

The Court: I don't see how that gets us out of the difficulty at all. That is what Mr. Shanner objects to.

Mr. Davidson: Well, if it changes the evidence, anything that is material in the case, I won't insist on the map, but I do not understand there were any such changes.

May we inquire of this man, your Honor?

The Court: I don't know. This is beginning to look like an endurance test.

259 GEORGE W. ZUELOW, called as a witness on behalf of the Plaintiff herein, having been first duly sworn, was examined and testified as follows:

Direct Examination.

By Mr. Davidson:

Q. Will you give us your name?
A. George W. Zuelow.
Q. And where do you live, sir?
A. In Chicago.
Q. Will you give us the street address?
A. 12239 South Lafayette.
Q. What is your occupation?
A. Civil Engineer.
Q. By whom are you employed?
A. Board of Engineers, U. S. Army.
Q. How long have you been with them, sir?
A. Twenty-three years.
Q. How long have you worked in this general area?
A. The same time.
Q. Are you familiar with the portion of the Illinois River located in Starved Rock, Illinois?
A. Yes.

260 Q. We have a map here marked Plaintiff's Exhibit No. 11 for identification made by your department in 1936, I believe—yes, October, 1936—I wonder if you would look at this map, sir, and tell us, if you know, what changes there were between the conditions as shown in that map of that area and the conditions as they were in April of 1948.

(Map shown to the witness.)

Mr. Shanner: That is objected to.

Mr. Davidson: I am referring to any substantial changes in the shore line, waterways, anything of that character.

Mr. Shanner: That is objected to, your Honor. I think the proper way to lay the foundation is whether or not that accurately portrays it as it was in 1948, and then whether it was different from what it was in 1948.

The Court: It means the same thing, doesn't it? He is going about it in a different way.

The Witness: This map, in all details, is approximately as it is today due to the fact we have a water control point, a step-by-step lock dam, the water elevation is controlled by the step-by-step lock dam and is maintained at an

261 elevation of 459 feet above mean sea level.

By Mr. Davidson:

Q. I see. Would that mean the entire waterway along each bank and extending in either direction as it was in 1936 would be substantially the same at all times?

A. That is right.

Q. When was that dam and lock put in there, do you know, about?

A. The lock and dam was completed as I recall approximately in 1930 and '31, but the waterway was not put in there until 1935.

Q. Would you say whether or not, in your judgment, that map is substantially a true and correct picture of the fixed permanent objects as shown in that map?

A. Yes, it is.

Q. As it is now?

A. Absolutely.

Mr. Davidson: Now, one thing; we are not making any particular point of it, your Honor, as I said, but counsel has objected to it—

By Mr. Davidson:

Q. Did you, at my request, check on the phone to find out just when they started to cut through south of those islands?

262 A. Yes, I did.

Q. And when the work was completed?

A. Yes.

Q. Suppose you give us the date of that, if you will?

A. The contract was completed, as far as our office was concerned, and traffic was initiated in May, 1947.

Q. In May, 1947; in other words, boats could go through there any time after '47?

A. That is right.

Q. What about the north channel around north of the islands, whether or not that is a navigable stream?

A. Yes, but we will not maintain it in the future.

Q. In other words, you mean boat traffic will have the benefit of the maintenance and protection on the south channel?

A. That is right.

Q. What is the depth of the Illinois River around the north side of that dam?

A. At the time this map was made and up until 1947 in May, when the other channel was completed, we maintained that at nine feet, we had a 300 foot channel, 300 feet wide, that is, and nine feet deep.

Mr. Davidson: I offer the map in evidence as Exhibit 11.

263 The Court: You still object?

Mr. Shanner: May I ask a question?

The Court: Yes, sir, ask whatever you want.

Cross Examination.

By Mr. Shanner:

Q. Mr. Zuelow, that map does not show the channel that was dug through there just south of Edwards' Run and south of this island, does it?

A. No, sir.

Q. This portion of this map there south of Edwards' Run and south of the island is different on the map from the way it is now?

A. That is right.

Mr. Shanner: I persist in my objection.

The Court: That is the only difference?

The Witness: Yes, sir.

The Court: The objection is overruled, it may be admitted.

(Which said document, so marked as Plaintiff's Exhibit No. 11 for identification, was thereupon received in evidence.)

264 Mr. Davidson: I am through with the direct examination.

Mr. Shanner: May I ask one other question?

By Mr. Shanner:

Q. When you say you won't maintain, or "We won't maintain," that is you said, "We won't maintain," you mean by "We," the corps of engineers of the Army?

A. Yes, that is right.

Q. Maintain what, you use that term, something in the River?

A. Yes.

Q. What do you mean you won't maintain, its depth, or what?

A. Well, we won't maintain it in any manner. It was advantageous to the interest of navigation to make this cut-off channel that comes through there north of that bend, so that part of the River is now out of protection, this new portion is in the protection now.

Q. Was this part of the River out of your protection after May of 1947 when this was opened to traffic?

A. Yes.

Q. Did you, after May of 1947, maintain in any way this body of water up here that is called Edwards' Run?

A. No.

265 Q. Did you ever maintain that Edwards' Run?

A. No.

Mr. Shanner: I think that is all.

Redirect Examination.

By Mr. Davidson:

Q. You never maintained any part of the north bend of that River?

A. No, sir.

Q. When you say "Before 1947"—

A. Oh, no, that is not right.

Q. That is what counsel asked.

Mr. Shanner: No, that is not what I asked.

By Mr. Davidson:

Q. Did you dredge through there or do you do dredging?

A. As I said before, we have a channel, this left portion on the map indicates a nine foot depth and we maintain that 300 feet wide, nine feet deep.

Q. When you spoke about project, that is what I didn't quite understand when you spoke about project—

A. Well, the project that our department has undertaken to maintain is a 300 foot channel, nine feet deep, for the entire length of the Illinois waterway. It just so hap-

266 pens in this process that these locks at that point are within those limits.

Q. Is that north bend of the River actually wider than 300 feet?

A. Yes.

Q Considerably wider?

A. Just by inspection, I would say it was, without a scale I couldn't say exactly what it was.

Mr. Shanner: There is a scale on there presumably.

Mr. Davidson: We are through with this man. Thank you for coming in.

(Witness excused.)

Mr. Davidson: I have one brief witness from the Coast Guard but he has to get permission from the Court before he testifies.

The Court: Permission from whom?

Mr. Davidson: From you, Your Honor, he has a letter or something.

The Court: All right.

Do you want to say something before you testify?

The Witness: Yes, sir, I would like to ask you to read this letter from the District Commander.

267 The Court: Have you read this letter?

Mr. Davidson: No, your Honor.

The Court: In substance it is to the effect he can only testify to matters within his own personal knowledge. Is that what the meaning of this is?

The Witness: Yes, sir, that is the meaning of that blue slip.

Mr. Davidson: I have just a question or two to put to this man.

The Court: Maybe we won't have any trouble. What are your questions?

Mr. Davidson: Just about what an operator's license is and what requirements a man has to have to operate boats.

The Court: That won't bother you.

The Witness: The question is, is this the proper way to subpoena us to testify, and not get me into trouble with the Commander or the Coast Guard or the Court.

The Court: We are not going to get you into trouble with your Commander, at least we don't want to, and you won't have any trouble around here, either. All he

268 wants to ask, what was that simple question you want to ask?

Mr. Davidson: When a man has a right to operate boats on the navigable waters of this country, when he has an operator's license to operate boats. Maybe we had better get his name and address, your Honor; may we do that?

The Court: Yes, sir.

THOMAS P. McMASTER, called as a witness on behalf of the Plaintiff herein, having been first duly sworn, was examined and testified as follows:

Direct Examination.

By Mr. Davidson:

Q. What is your name?

A. Thomas P. McMaster.

Q. Where do you live, Mr. McMaster?

A. 8633 South Laflin Street, Chicago.

Q. What is your occupation?

A. I am a Lieutenant Commander, Coast Guard Marine Inspector.

Q. How long have you been with the United States Coast Guard, sir?

269 A. Well, the Coast Guard took over the Marine Inspection functions on the 1st of March, 1942. Prior to that I was an Inspector for the Department of Commerce from the 13th of June, 1936, up until that date.

Q. Does your work have something to do with the issuance of licenses to operate navigable boats carrying passengers for hire, Mr. McMaster?

A. Yes, sir, that is part of it.

Q. Will you tell us where that authorizes an operator to operate such boats?

A. Well, he can operate a motor boat carrying passengers for hire under 65 feet in length on any navigable waters in the United States.

Q. Does that include ocean waters?

A. Coastwise, yes.

Q. Coastwise.

A. Yes.

Mr. Davidson: I would like to mark this Exhibit No. 12.

(Said document was marked Plaintiff's Exhibit No. 12 for identification.)

By Mr. Davidson:

Q. Please look at this, Commander, and tell us

270 whether that document, Plaintiff's Exhibit No. 12, is a license issued by your Department on the date it bears to Thomas Desper, Jr.?

(Document shown to the witness.)

A. It is.

Q. Is that a license of the kind I have just asked you about?

A. Yes, sir.

Mr. Davidson: That is all.

Mr. Shanner: May I ask just one question?

The Court: Yes, sir.

Cross Examination.

By Mr. Shanner:

Q. Mr. McMaster, is this document, Plaintiff's Exhibit No. 12, this is not a pilot's license is it?

A. No, sir, that is merely a motor boat operator's license.

Q. Where are your headquarters here?

A. At 610 South Canal Street, the 11th Floor in the Customs House.

Mr. Shanner: Thank you, sir.

Mr. Davidson: That is all.

271 The Court: That did not embarrass anybody, did it?

The Witness: No, but that was the instructions.

The Court: Well, we followed the instructions.

The Witness: Thank you very much.

(Witness excused.)

Mr. Davidson: I would like to offer this in evidence, Plaintiff's Exhibit No. 12, I have shown it to counsel.

Mr. Shanner: I have no objection.

The Court: All right, that may be admitted.

(Said document, so marked as Plaintiff's Exhibit No. 12 for identification was thereupon received in evidence.)

The Court: Have you another short witness?

Mr. Davidson: No, I haven't Judge, not right now, the man I have coming here to put on, when I get him on, it will take some time.

The Court: That is true of practically every witness you have put on, so we might as well take a recess then until Monday morning at 10:15.

(Whereupon, an adjournment was taken in the above-entitled case to Monday April 24, 1950, at 10:15 o'clock a.m.)

272

IN THE UNITED STATES DISTRICT COURT

* * (Caption—No. 49 C 481) * *

Before Judge Igoe and a Jury,
Monday, April 24, 1950,
10:15 o'clock a.m.

Court met pursuant to adjournment.

Parties Present:

Mr. Ryan,
Mr. Davidson,
Mr. Sullivan,
Mr. Shanner.

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273 The Clerk: Case No. 49 C 481, Desper versus Starved Rock Ferry Company, on trial.

The Court: Proceed, gentlemen.

Mr. Davidson: Your Honor, we have prepared an amended complaint to conform to the proof in the case and I ask leave to file it instanter.

The Court: Any objection?

Mr. Davidson: And the defendant reply

Mr. Shanner: I have no objection, your Honor, as I think he has a right to file it. My question is what to do about the answer or a motion in the nature of a demurrer in the case. He has inserted a new paragraph so my original answer should not stand.

The Court: What is the new paragraph?

Mr. Shanner: Paragraph 4 and my motion now, your Honor, is that I make a motion to strike that paragraph. I only had this in my hand a matter of a couple of minutes, I have not had a chance to really study it.

The Court: I don't know exactly what that means but it definitely fits in with the kind of evidence they have.

Mr. Shanner: It definitely does, but my suggestion as a practical matter is that he be given leave to file, I think
274 he has that right, I don't think there is any question about that.

The Court: And you move to strike what paragraph?

Mr. Shanner: I move to strike Paragraph 4 of the amended complaint, declaration, and I can furnish a written motion later. I ask that your Honor reserve ruling on my motion to strike until after the plaintiff's case, at the close of the plaintiff's case that can be argued at the same time as my other motion.

The Court: That is, perhaps, the practical way to deal with it. He is given leave to file his amended complaint and you move to strike Paragraph 4 of the amended complaint and that motion is taken under advisement and it will be passed upon at the time the plaintiffs have completed their case.

What about his answer to the amended complaint, how are you going to handle that?

Mr. Davidson: The other portions are substantially the same.

The Court: It would be the best way, that he files the amended complaint and you move to strike Paragraph 4, so far as answering the amended complaint, is that the only new part?

Mr. Davidson: That is the only essentially new part.

Mr. Shanner: That is the only substantially new part.

275 The Court: The answer on file will stand as the answer to the amended complaint except as to Paragraph 4 which is the subject matter of the motion.

Mr. Shanner: The difficulty with that is my answer is now on file and for instance, I say the defendant denies the allegation contained in Paragraph 4 of the original complaint and that is now Paragraph 5, and consequently my answer on file now is not exactly responsive by paragraphs since the amended complaint changes them around.

Mr. Davidson: You deny the allegations, I think that is all right.

The Court: What is your suggestion?

Mr. Shanner: My suggestion as to that is, I filed an answer to the amended complaint, except Paragraph 4, by 2:00 o'clock today.

The Court: Then we will let the order stand. You file your answer instanter, so you can come in at 2:00 o'clock. What is left of the evidence in this law suit?

Mr. Davidson: I have one witness concerning the cylinder itself and then the mother of the deceased.

Mr. Shanner: I would like permission of the Court to recall Mr. Kennedy for a couple of further questions
276 on cross examination.

The Court: Yes, sir.

(The following proceedings were had in open court in the presence and hearing of the Jury:)

MICHAEL H. ARNOLD, a witness called on behalf of the Plaintiff herein, having been first duly sworn, was examined and testified as follows:

Direct Examination.

By Mr. Davidson:

Q. Will you state your name, sir?
A. Michael H. Arnold.
Q. Where do you live, Mr. Arnold?
A. Home address?
Q. Yes, your home address.
A. 1545 North Lorel.
Q. What is your occupation?
A. District Manager for the Walter Kidde Company.
Q. Where are their home offices located?
A. Belleville, New Jersey.
Q. What is their business, Mr. Arnold?
277 A. Manufacturers of fire fighting equipment.
Q. About how long have you been with the company?

A. About six years.

Q. Do they have offices here in Chicago?

A. Yes.

Q. Will you give us their location?

A. 154 East Erie.

Q. You spoke of yourself as being District Manager of the company; of what does your district consist?

A. You want the states?

Q. Yes.

A. Minnesota, Wisconsin, Iowa, a portion of Missouri, Illinois, Indiana, a portion of Michigan.

Q. You spoke of their being manufacturers of fire fighting equipment, what are your duties as District Manager?

A. Sales only.

Q. Are you an engineer?

A. Not a graduate engineer, no sir.

Q. Do you have knowledge of engineering?

A. Yes.

Q. And as part of the installation for your company, do you have to advise your customers on the engineering problems associated with their installation?

278 A. Yes.

Q. What type of concerns do you do business with?

A. All kinds of manufacturers who have any kind of a fire hazard.

Q. Who are some of the accounts you do business with in this area?

A. Sherwin-Williams, Standard Oil, Commonwealth Edison, Shell, Container Corporation.

Q. The Container Corporation, I see you smile, I just saw its name in the paper. Did you, at our request, look at a cylinder—yes, a cylinder and several small parts of metal that went with it, last night?

A. Yes, sir.

Q. I want to show the cylinder to you again, Mr. Arnold, and ask you if this is the cylinder that you looked at, at our request?

A. Yes, it is.

Q. The one now marked Plaintiff's Exhibit No. 6 for identification?

A. Yes, sir.

Q. When you saw it, was it in this same container, this box which I have shown you here, which is marked Plaintiff's Exhibit No. 10?

A. Yes.

279 Q. Did you also tell me at that time these several pieces of metal that I hold in my hand—

A. Yes.

Q. —is this piece of metal any part of the container, your cylinder, I mean?

A. It doesn't look familiar, it could possibly be, though.

Q. We will set that aside. Here is a small piece of metal which was not numbered nor given an identification number, will you tell us what these other component parts are and explain where they act or are located on the cylinder?

A. This portion goes in here to hold your gas with this, to seal it. This is the orifice where the gas comes out and where the cap fits over that.

Q. Which cap fits over that? The one I hold in my hand? If your fingers are in good condition, that goes in there sir, don't force it.

A. No. Yes.

Q. The one component, this piece on the side of the cylinder, is the one marked Plaintiff's Exhibit No. 7, is that right?

A. Yes, sir, that goes on the side.

Q. Anything on top?

280 A. This is, it is changed where the nipple goes.

Q. How do you identify that cylinder as one made by your company?

A. The W. K. stamp right here, 245, which means made in February, 1945, by Walter Kidde.

Q. Is that name on the front of the container, sir?

A. Yes, sir.

Q. Where was that made, would you know?

A. Belleville, New Jersey.

Q. Did you work in the plant of the company?

A. Yes.

Q. During what period, in Belleville, New Jersey, during the war?

A. Yes.

Q. What was that piece of equipment made for, if you know?

A. That was designed through our Engineering Department and the United States Army Engineers for the protection of Army tanks.

There was a pipe system on the inside of the tanks that operated them manually or automatically.

Q. And how was that designed to operate in so far as discharging the gas in it?

281 A. The engineers have so built these big outlets on the valve that they form a broad valve in order to get all the gas out of the container in a matter of fifteen or twenty seconds, because in case a tank was hit and on fire, having personnel in it, they wanted the tank clouded in carbon dioxide gas as soon as possible.

Q. What kind of gas was kept in that cylinder?

A. Carbon dioxide gas.

Q. Is that an inflammable gas?

A. No.

Q. How does that operate to put fires out?

A. It takes the oxygen out of the air until the air will not support combustion.

Q. Is that commonly used fire protection?

A. Oh, yes, very common, carbon dioxide.

Q. Is it used in food or beverages?

A. Yes, some gas is used to carbonate water and soda at soda fountains, and so on.

Q. What metal went into the main body of the cylinder, can you tell us?

A. The cylinder is made from chrome alloy steel.

Q. What are the fittings in the top of it made of?

A. Brass.

Q. And to what extent were those products made by
282 your company during the war?

A. Very, very extensively for the Army Ordnance for tanks, I mean just the Ordnance Department program alone, we made thousands of them.

Q. What is the approximate weight of the cylinders when they are empty?

A. I would say about 30 pounds pressure of gas.

Q. Do you know the dimensions, the height and diameter of it?

A. No, I don't.

Q. What pressure was the cylinder made to withstand?

A. The pressure of gas?

Q. The pressure, the gas pressure, in there, well—to reframe the question—

A. This is a 10 pound cylinder and then it has 10 pounds of liquid carbon dioxide in it, that is 60 per cent full, and it has a pressure of approximately 840 pounds per square inch at 70 degrees.

Q. Did the company place the gas in these tanks before they were shipped out?

A. Oh, yes.

Q. What test or inspections were any of these cylinders put through to determine whether they were in proper condition?

283 A. Not only our own company inspection, but on the neck of the cylinder is "I.C.C. 31800," a number that means the cylinder was re-inspected by a representative of the Interstate Commerce Commission, an independent inspection entirely of our organization, and further re-inspected by Army Ordnance before assembly and after it was assembled and filled by the Ordnance inspector.

Q. What pressure is the cylinder made to withstand, approximately?

A. 3,000 pounds per square inch.

Q. Do you know, Mr. Arnold, the effect of suddenly releasing the nut that would hold the gas in the side of that brass fitting if the cylinder had in it the gas pressure you have mentioned, 840 pounds per square inch?

A. If you were suddenly to release the gas, the cylinder would take off just like to was jet propulsion because 840 pounds is trying to get out of a one and a half inch opening.

Q. When you examined the cylinder and these other pieces of metal, including the nut marked Plaintiff's Exhibit No. 7, did you determine anything about the condition of the nut itself?

A. I didn't. Of course, the threads are damaged
284 there now, that could have happened afterwards, it couldn't have been that way before or it could not never have gotten into the Army stock.

Mr. Shanner: I move to strike that, your Honor.

Mr. Davidson: I suggest he is merely qualifying his testimony.

The Court: Let us see, what is the motion?

Mr. Shanner: The motion is to strike. Read the witness' answer.

(Answer read.)

Mr. Davidson: I submit that is competent, your Honor.

Mr. Shanner: He is qualified as a salesman, your Honor.

The Court: No, he went further than that, he said he also had practical engineering.

Mr. Shanner: No, he didn't say that, he said, "I am not a graduate of an engineering school."

The Court: Doesn't that mean the same thing?

Mr. Shanner: No, sir.

The Court: A practical engineer, and not a graduate.

285 Mr. Shanner: He didn't say he was a practical engineer.

The Court: What did you mean by your statement?

The Witness: I have had two years of engineering and engineering experience.

The Court: You have practiced engineering?

The Witness: Yes.

The Court: You have been devoting how many years of your life to this work?

The Witness: Six years.

Mr. Shanner: And on the motion, your Honor, the answer is purely the conclusion of the witness and invades the province of the jury.

The Court: Most experts give conclusive answers, don't they?

Mr. Shanner: Most of them do in answer to hypothetical questions as to what could or might have been.

The Court: All the testimony experts give is certainly based upon conclusions of one kind or another. Your motion is overruled.

By Mr. Davidson:

Q. Would you tell us a little more about your practical work with these cylinders? And their design and their

286 use.

A. Well, we make and furnish naturally a carbon dioxide extinguisher for traffic use and the large 50 pound cylinder for industrial building use, also manufacture a different type of cylinder for marine work, for boats where the pressure generated is amazing on liners, and still a different type of cylinder for aircraft to put out fires in the engines themselves, and luggage compartments, and for use there in the aircraft or in the air port.

Q. In your work in the factory, did you ever actually contact the production end of the business?

A. Not with my hands, no, but in a supervisory capacity.

Q. That is what I had in mind, sir. Will you look at the threads on the side of that cylinder there, that nut, and tell us what that condition is and I might say I have brought a magnifying glass here with me, if it would help you, Mr. Arnold.

A. I can see them all right.

In my opinion, without a gauge, without putting a gauge to them, they look all right to me.

Q. Did the company place anything on the nut that
287 you hold in your hand in the way of a colored device, to indicate the pressure?

A. There used to be, on a new cylinder, there was a little red seals for caution placed over that.

Q. Well, that was proved by one witness here last week—

A. The reason for that— ——

Mr. Shamner: Here it is. I object to the reason for it.

Mr. Davidson: Would it remain right there?

The Court: The lawyer is not giving the reason for it. Let the witness testify.

By Mr. Davidson:

Q. Is that the standard method of protecting those cylinders and their attachments, putting on markings of that kind? Just yes or no.

A. No.

Q. Is it standard for your company?

A. No.

Q. Was that done in this particular case, on this production, in accordance with some specification?

A. U. S. Ordinance specifications.

Q. Is that true of the red caution on the other side of that cylinder, also, at the top?

288 A. That is right.

Q. Now, what was the proper way to attach that cylinder if someone wanted to put it in a boat and fit it up to a series of pipes all around a 50 or 70 foot boat, I think in that neighborhood, about 50 feet, but with piping running around the sides of the boat?

You are now unscrewing that, what is that called, Mr. Arnold?

A. The outlet.

Q. By the way, is that cylinder empty now, just for the information of all here?

A. Yes, it is empty.

Q. It is called an outlet?

A. No, there is a plunger that releases the gas in there, the proper way, your release mechanism goes in through here and you come out with a riser that is attached to pipe or copper tubing.

Q. How is the gas released if someone wanted to release it, under the plan as set up for tanks, how would they release that gas?

A. There is a control mechanism for the release of the plunger in there that allows the gas to come out through the opening.

Mr. Shanner: May the record show, your Honor,
289 he was unscrewing or attempting to unscrew the nut that goes on to the side adjacent to the nut or the cap that is red? I just want that to show in the record.

The Court: All right.

Mr. Davidson: So there will be no misunderstanding in view of counsel's statement, in other words, if that was applied to a tank, how would that be released without releasing this tremendous pressure?

The Witness: By taking off certain parts, you can take this cap off, for example, without any damage at all.

Mr. Shanner: That is the top cap?

The Witness: Yes.

By Mr. Davidson:

Q. In other words, can it be connected up without releasing the pressure as apparently it was done in this case?

A. Oh, yes, it has to be. We ship these, for example, to Africa, for installation in tanks that are brought in for replacements, they were all installed full, fully charged.

Mr. Davidson: That is all, cross examine.

290 *Cross Examination.*

By Mr. Shanner:

Q. Did you know Mr. Birkenbuel who was the owner and head of the Starved Rock Ferry Company?

A. No, I don't.

Q. Do you know whether or not that particular tank that you have been experimenting with here, was sold by your company to his company?

A. I don't know, but I am sure it wasn't because we sold nothing surplus.

Q. Do you know whether or not your company gave any instructions or advice of any kind to the Starved Rock Ferry Company as to how to operate that apparatus?

A. No, sir, I don't know.

Q. You do not know. Do the instructions go with those when you send them out from your factory or plant, in this particular case?

A. In this particular case, no, the instructions went to Army Ordnance for distribution to the different serv-

ices that were handling the material or to the companies who were building the tanks for proper installation.

Q. What I meant was, when one of the customers you mentioned here on direct examination, if they bought
291 some of those, do you send instructions along with them or do you send somebody to install them, or what?

Mr. Davidson: You mean, if they bought the merchandise from the Kiddie Company?

Mr. Shanner: That is right.

Mr. Davidson: Or surplus, he says they were not selling surplus.

The Court: He means bought new.

By The Witness:

A. If they buy new from us on large industrial installations, we either installed ourselves or we send complete layout drawings and installation instructions and then inspect it after it is installed.

Mr. Shanner: I think that is all.

Mr. Davidson: That is all, thank you, Mr. Arnold.

(Witness excused.)

ROBERT KENNEDY, heretofore called and sworn as a witness on behalf of the Plaintiff herein, recalled for further examination having been previously duly sworn, resumed the stand and testified further as follows:

292 *Cross Examination (Resumed).*

By Mr. Shanner:

Q. You are the same Mr. Kennedy who testified here Thursday, I believe, last Thursday?

A. Yes, sir.

Q. Do you recall what date, Mr. Kennedy, you finished working there at Buffalo Rock?

A. I do not know.

Q. Do you recall the approximate date?

A. Well, I would say between the 18th and the 21st of May.

Q. Now, did you testify at the inquest that was held down in Ottawa, Illinois, on April 30th, over the body of Charles Birkenbuel?

A. I did.

Q. There was a Coroner there, A. J. Roberts?

A. Yes, sir.

Q. Were you under oath at that time?

A. Yes, sir.

Q. Were you asked these questions and did you make these answers:

"Q. Can you tell us the cause of this explosion?

"A. I couldn't, at the time my back was turned."

Were you asked that question and did you make that answer?

293 A. I believe that is right.

Q. Were you asked this question and did you make this answer:

"Q. Anything further you know about this accident?

"A. No, sir."

Were you asked that question and did you make that answer?

A. I don't recall the question at the present time, but it should be right.

Q. Then did Mr. Herbolsheimer, who is one of the attorneys for the plaintiff in this case, did he ask you this question and did you make this answer:

"Question by Mr. Herbolsheimer:

Mr. Birkenbuel was examining the extinguishers in that way, turning the valves?

"A. He was reading the instructions when I saw him, I thought it was instructions but it turned out it wasn't."

Were you asked that question and did you make that answer?

A. I don't remember, sir.

Mr. Shanner: That is all, your Honor.

294 *Redirect Examination.*

By Mr. Davidson:

Q. How soon were the Government inspectors out to see you, Mr. Kennedy? You mentioned last week that the Government inspectors came to your house and one of them spoke to you and took a statement.

A. I didn't understand he was a Government inspector.

Q. Well, from the Coast Guard.

A. He was from the Coast Guards.

Q. Well, that is part of the Government, sir. When did he come out there?

A. I don't remember the exact date.

Q. Did he ask you what you knew about the occurrence at that time?

A. He asked me at that time to recall it, if I could.
Q. Did you tell him what you knew about it, sir?
A. As near as I could remember, yes.
Q. Have you seen the inquest testimony?
A. Not to my knowledge.
Q. Do you know how soon after the occurrence the man was out from the Coast Guard to see you?
A. I couldn't state truthfully, no.
Q. Was it about the time of the inquest or long afterwards?
295 A. It was after the inquest, sir.
Q. Did he take a detailed statement about everything?
A. He had a stenographer with him.
Q. A stenographer with him?
A. Yes, sir.
Q. All right, sir.
At this inquest, they didn't go into any detail at all with you about where you were standing and which way you were facing and what you saw prior to the time you saw him reading the instructions?
Mr. Shanner: That I object to.
The Court: Objection sustained.
By Mr. Davidson:
Q. Did they ask you anything about whether you made that statement about him opening the valve when someone had warned him at the time—
Mr. Shanner: I object to that, if the Court please.
The Court: You are bound by what the record shows, aren't you?
Mr. Davidson: I have the right to show they did not go into any details with him. Counsel has read it, and I propose to show there is only about six or seven questions.
296 Mr. Shanner: Your Honor, I read the questions that said, "Do you know anything else about this?" He said no.
By Mr. Davidson:
Q. Do you remember anything about the inquest or what questions were asked at that time?
A. No, sir.
Q. Have you ever seen it since the hearing, sir?
A. No, sir.

Mr. Davidson: That is all.
Mr. Shanner: That is all.
(Witness excused.)

ANNA MARIE DESPER, one of the Plaintiffs herein, called as a witness on behalf of the Plaintiffs, having been first duly sworn, was examined and testified as follows:

Direct Examination.

By Mr. Davidson:

Q. Will you give us your name?
A. Anna Marie Desper.
Q. Where do you live, Mrs. Desper?
A. La Salle, Route 1, La Salle, Illinois, Route 1.
297 Q. What is your occupation?
A. Housewife.
Q. Are you the mother of Thomas J. Desper, Jr., deceased?
A. I am.
Q. Now, what was his age at the time of his death, Mrs. Desper?
A. Well, he was 21 in October, the 15th, and he got killed the 26th of April.
Q. He was born October 15th, 1926, in La Salle, Illinois, is that correct?
A. Yes, sir.
Q. And except for a period of time when he was away in the Service, did he live at home with you?
A. All the time.
Q. Did you raise him and bring him up?
A. Yes.
Q. As far as you know, was he in good health before this accident?
A. Yes, he was.
Q. I understand he was a tall, strong, healthy young man, is that right?
A. Yes.
Q. What were his habits as to sobriety, industry,
298 and working?
A. He was a good boy and he helped around the house when he wasn't working, and helped me because I am sick all of the time and need the help.
Q. I just wanted to know if he was a boy of good and sober habits.

A. Well, he would take a glass of beer like anybody else.

Q. Was he an industrious boy, would he work?

A. Yes, he was.

Q. You mentioned he lived at home with you, did you know about the time he started to work for Birkenbuel and the Starved Rock Ferry Company in 1947?

A. I think he started around March 1st.

Q. I am referring now to the year before the accident, Mrs. Desper.

A. Yes.

Q. Did he work for them during most of that year?

A. He worked for them the whole season.

Q. Did he act as operator or pilot during that year, to your knowledge?

A. Yes, he was a pilot on one of those boats.

Q. Did he go back to work for Birkenbuel and the Starved Rock Ferry Company in 1948?

299 A. Yes, he did.

Q. During the year before the accident, when your son was working and living at home with you, how often would he get paid, Mrs. Desper?

A. Every two weeks.

Q. Did he bring any part of his pay home to you?

A. Well, he brought his pay home, he would bring his pay, he would pay his gas and things he would have to have during the week and the rest he would bring home.

Q. Did he drive to and from work in an auto?

A. Yes, he did, in a car.

Q. Did he ever take you out riding in that car?

A. He sure did.

Q. How much would your son bring home during the period when he was working piloting boats?

A. Well, that all depended, too, sometimes he worked overtime more than he did other times, and he would bring home about a hundred, sometimes a hundred and twenty, a hundred and thirty. That all depended on how much he worked.

Q. You mentioned something about his helping around the house, in what way did he aid you and help you there around the house, Mrs. Desper?

A. Well, he fixed around, helped do everything 300 that was to be done around there, his father was sick and he couldn't do anything.

Q. During the year 1948, after your son began to work for this same company, did he continue to bring home his money after he took care of his living expenses?

A. He brought his pay just the same.

Q. Did he spend much time with the family?

A. He would go out on his days off, and when he would have a day off he would go out, but other times he was home, he never went out.

Mr. Davidson: All right, you may cross examine.

Cross Examination.

By Mr. Shanner:

Q. You say he brought home sometimes $100, sometimes $120, sometimes $130?

A. Yes, sir.

Q. Did he have any other source of income, other than what he made at the Starved Rock Ferry Company?

A. No, he didn't.

Q. Now, sometimes he brought home less than $100, didn't he?

301 A. Well, that all depended on how many hours he put in, if it was a good week they would work more hours.

Q. I understand that, how many times would you say he brought home as much as $130 on a pay day?

A. Well, I just wouldn't exactly say that, I just wouldn't exactly say how many times.

Q. Can you say whether he brought home $130 as much, as many times as he brought home less than $100?

A. Well, during the time that he was working on that boat, well, they would work sometimes maybe until 9:00 o'clock at night.

Q. I understand.

A. And then his pay would be more than it would be if they only worked eight or nine hours a day, and he couldn't bring so much pay home then.

Q. Now, my question is, Mrs. Desper, if you can't answer it, just say so—

A. Well, I just couldn't say, I just couldn't say that for sure.

Q. Now, then, you say he boarded at home?

A. He didn't board, yes, he was home, he stayed home.

Q. I mean he ate his meals at home?

A. Yes.
302 Q. You gave him his meals out of his money?
A. Yes.
Q. You furnished him with a room?
A. Yes.
Q. You took care of him?
A. Yes.
Q. Did he take his lunch?
A. Yes, he took his lunch.
Q. And then you bought him clothes from time to time?
A. I bought their father's clothes, yes.
Q. Out of the money he brought home?
A. Yes, and if he wanted money he would just ask me, if he wanted some money to spend, and I would give it to him.
Q. Out of the money he brought home?
A. Yes.
Q. What did he do in the winter of 1947 and 1948?
A. Well, that was down around February or November, I can't say just now for sure, but then he brought his compensation when he was off, you know.
Q. What compensation is that?
A. Well, now, I don't know if it was he had coming from the war or what, or if it was for that one year out of work at $20 a week.
303 Q. That he got from the State of Illinois?
A. Yes.
Q. Did he do any work during the winter of 1947 and 1948?
A. Well, that I know of, no, that I know of, anything that he done.
Q. When did he get out of the Army?
A. Sometime I think, he came home, I think, sometime in November.
Q. Of '40—
A. '46.
Q. '46, was it?
A. '46.
Q. He went in sometime in February or the 1st of March, '45, didn't he?
A. Yes.
Q. How long was he laid up with that broken foot?
A. Three weeks.
Q. And that happened in November of 1946?

A. It just happened, he was home one week when he got this job and he was two hours when he had his foot broken.

Q. And he was laid up, did you say, three weeks?

A. Well, it was after January.

304 Q. After when, after the month of January?

A. It was in January that he had the cast taken off.

Mr. Shanner: I think that is all.

Redirect Examination.

By Mr. Davidson:

Q. Was much of that the son brought home to you, when he was working for the Starved Rock Ferry Company, was much of that money used by him for spending money and for clothes?

A. Well, he gave it to me and I used it for the household and for his clothes, and if he wanted spending money I would give it to him.

Q. I am trying to find out if you can tell us, if you can't, it is all right, how much was spent for his clothes and spending money and how much was used for you, yourself, and for the house.

A. Well, I just don't know, I just couldn't tell you definitely.

Q. Don't tell us the reason, Mrs. Desper, but were you in a situation at that time where you had to use most of the money for yourself?

A. For the doctors, yes, I am under the doctor's care all the time.

305 Mr. Davidson: That is all, thank you.

Recross Examination.

By Mr. Shanner:

Q. Are you still under the doctor's care?

A. I sure am.

Mr. Shanner: Thank you.

(Witness excused.)

Mr. Davidson: I desire to read into the evidence, your Honor, Plaintiff's Exhibit No. 12 which has been admitted in evidence.

The Court: That is the license?

Mr. Davidson: License as a pilot. Serial No. 50319.

Mr. Shanner: I object to Mr. Davidson saying the li-

cense is a pilot's license, the use of the word "pilot."

Mr. Davidson: I will read the document to the Court. It is properly issued by the Government, and I suppose—

The Court: It will indicate what it is.

(Plaintiff's Exhibit No. 12 was thereupon read into the record and is in words and figures, as follows, to-wit:)

306 Mr. Davidson: The Plaintiff rests, your Honor.

Thereupon Plaintiffs Rested Their Case.

The Court: The jury may take a recess for a few moments.

(A short recess was taken.)

(After the recess Defendant's argument on motion to direct was heard and not written up.)

The Court: I think this is a very close case but I am going to overrule your motion for the present, but it may be renewed at the conclusion of the testimony and let us hear what the case is.

(Whereupon a recess was taken to 2:00 o'clock p.m. of the same day, Monday, April 24, 1950.)

307

IN THE UNITED STATES DISTRICT COURT

* * (Caption—No. 49 C 481) * *

Before Judge Igoe and a Jury,
Monday, April 24, 1950,
2:00 o'clock p.m.

Court met pursuant to recess.

Parties Present:
Mr. Ryan,
Mr. Davidson,
Mr. Sullivan,
Mr. Shanner.

308 And Thereupon Defendant, To Maintain The Issues On Its Part, Introduced The Following Evidence, To-Wit:

STEVE DOOLAN, a witness called on behalf of the Defendant herein, having been first duly sworn, was examined and testified as follows:

Direct Examination.

By Mr. Shanner:

Q. What is your name, please?
A. Steve Doolan.
Q. Where do you live, Mr. Doolan?
A. Ottawa, Illinois.
Q. You live in the City of Ottawa or outside of it?
A. The west end of it, in the west end.
Q. Do you have a street address?
A. A what?
Q. Do you have a street address?
A. 915 West Jackson.
Q. Are you familiar with the section along the Illinois River there that is called Buffalo Rock?
A. Yes, sir.
309 Q. How long have you lived in that general section of the State of Illinois?
A. Well, I have lived there all my lifetime, mostly, 78 years.
Q. 78 years?
A. Yes, that is it will be in September, 78.
Q. Do you know where the Consumers Run, so-called, is?
A. Yes.
Q. And do you know the next little body of water over to the east of that, that is called Edwards Run?
A. No, you have reference to County House Creek.
Q. County House Creek?
A. Yes, they have started the Consumers Run at the end of it, excavating gravel.
Q. That is a gravel quarry?
A. Yes.
Q. Now, the County House Creek is where the Starved Rock Ferry Company stores boats during the winter?
A. That is a little to the east, the mouth of it.

Q. What is the fact whether or not you ever saw any other boats in that body of water?

A. Well, I couldn't say I did, I see some below the Rock and above it, but not at that point.

310 Q. But not at that point?

A. Not at that point that I know of.

Q. When did that body of water at County House or Court House—

A. County House.

Q. County House, when did that come into existence?

A. Well, they put in that Starved Rock dam and it backed that up, all up over that creek.

Q. Do you remember when they put the Starved Rock dam in?

A. I do, but not the date.

Q. Before they put the Starved Rock dam in, what was there where that body of water is now?

A. That was the mouth of the creek.

Q. Did the creek come right down to the bank of the River?

A. They have a waste gate on the Illinois-Michigan canal whenever it would overflow, they would raise this gate and run it down into this County House creek.

Q. Will you state whether the County House creek ran down to the bank of the River before the dam was built?

A. Yes, sir, it did and there was a road between it and a bridge across it to the land sides, of both sides.

Q. What was the land on both sides used for?

311 A. One was a man lived there at Buffalo Rock used to garden it and farm it and on the other side the County House people used the pasture for their cattle, their milk cows.

Q. Do you know how deep that little inlet is now, have you measured it?

A. No, I don't, not since the water has been backed up, it backed up the River, three miles up the River.

Q. Sir?

A. It backed the whole Fox River three miles up the River.

Q. That is three miles from there?

A. Yes, it backed up that much.

Mr. Shanner: You may cross examine.

Cross Examination.

By Mr. Davidson:

Q. Mr. Doolan, the water that has filled up Edwards Run, as they call it, is the water from the Illinois River, is that true?

A. I suppose the dam held it back and raised it.

Q. Yes, sir, the Illinois River itself along there, along in that region, is that used by boats of any kind?

A. Now?

312 Q. The Illinois River, during the last five years?

A. Yes, sir.

Q. What boats use it?

A. Well, there is boats coming east to what they call the deep waterway, floating millions of tons into Chicago here, in other words.

Q. Tug boats go along there, don't they?

A. We have counted even the Army boats.

Q. Army boats?

A. Yes, sir. I think during the war they had the Seneca Shipyards down there—

Q. Where was the Seneca Shipyards?

A. That was thirteen miles east of there.

Q. They sent submarines through there during the war?

A. Yes, sir, the Army landing craft, there was one Army boat went through the other day.

Q. Is it also used by the Federal Barge Lines, up and down the Illinois River there?

A. Yes, I think it is.

Q. Does the Marquette Cement Company have barges going up and down there?

A. Well, they have the cement company and everything else up there, you can bring eight and ten boat loads.

Q. Is it correct to say that most of the grain that goes out there, I have been given a figure of 90 per cent.
313 and I don't know if that is right, but 90 percent of the grain that goes out of there moves by the Illinois River?

A. Yes, sir.

Q. And some of the barges that go along there are three to four hundred feet long, carrying a little more than a trainload of merchandise?

A. I wouldn't say 350, probably a hundred and fifty to 200 feet.

Q. You say 150 to 200 feet?

A. Yes, but put two of them together, and there is eight or ten pushed by one boat.

Q. In other words, the Illinois River carries pretty heavy traffic along there?

A. Oh, I should say so.

Mr. Davidson: That is all, thank you.

(Witness excused.)

Mr. Shanner: Mark these exhibits 1 and so on, up.

(Said documents were marked as Defendant's Exhibits Nos. 1 to 15, inclusive, for identification.)

314

MICHAEL LEWIS, called as a witness on behalf of the Defendant herein, having been first duly sworn, was examined and testified as follows:

Direct Examination.

By Mr. Shanner:

Q. What is your name, young man?

A. Michael Lewis.

Q. Where do you live?

A. 912 Superior, Ottawa, Illinois.

Q. Were you working for Mr. Kennedy on the landing boat in April, 1948, when Tom Desper was killed?

A. Yes, sir.

Q. Where were you at the time?

A. Well, I was inside the boat there when the accident happened.

Q. By the boat do you mean that big white one?

A. Yes, sir.

Q. Next to what were you standing?

A. By Kennedy.

Q. By Kennedy, and did you see what Mr. Birkenbuel was—where Mr. Birkenbuel was standing?

A. Well, he was right behind me.

315 Q. And did you see Tom Desper?

A. Yes, sir.

Q. Where was he?

A. He was right by Birkenbuel.

Q. Had he been there all the time, do you know? Or did he walk over there sometime later?

A. Well, he was all over the boat, I couldn't say where he was, only at the time of the accident.

Q. What was your particular job there, working for Mr. Kennedy?

A. Spraying.

Q. Spraying what?

A. Well, we sprayed everything.

Q. At the time this accident happened, what were you doing?

A. He was spraying life preservers and I was hanging them up.

Q. What do you know or what did you see of what happened?

A. Well, all I know of, he was monkeying with the fire extinguisher when I heard Tommy tell him not to monkey with it, and he was kind of deaf, he didn't hear too well, and he hollered at him several times and he tightened the fitting back up with a pipe wrench.

316 Q. Then what happened?

A. Well, we started working again and all of a sudden I hear it sizzle and that was when it went off.

Mr. Shanner: I think that is all.

Cross Examination.

By Mr. Davidson:

Q. You say you were helping Mr. Kennedy there, helping him spray, Mr. Lewis?

A. He was spraying and I was hanging them up on the ropes there.

Q. Did you work there after the accident?

A. Yes, we did.

Q. And do you remember working there on some boats later?

A. Yes, sir.

Q. I am talking about boats that would carry passengers, ferry boats and launches.

A. Yes.

Q. Do you remember anything, Mr. Lewis, about what work you had done on those boats and whether you did work on the boats after this accident, on April 26th, 1948?

A. Afterwards?

317 Q. Yes, sir, in other words we want to know if you painted the boats before or after the accident, if you remember.

A. I believe we were all through with them before the accident.

Q. The life preservers you were working on were intended for some of the boats, is that right?

A. Yes, sir.

Mr. Davidson: That is all.
Mr. Shanner: That is all.
(Witness excused.)

GEORGE CLAUDNIC, heretofore called and sworn as a witness on behalf of the Plaintiffs herein, recalled as a witness on behalf of the Defendant herein, having been previously duly sworn, resumed the stand, was examined and testified as follows:

Direct Examination.

By Mr. Shanner:

Q. You are the same Mr. Claudnic who was sworn and testified here last week some time?

A. Yes, sir.

318 Q. Mr. Claudnic, I hand you what has been marked as Defendant's Exhibit No. 1 for identification and ask you to state whether or not this morning, at my request, you went through this book that you have referred to before this time, and state did you do that, did you go through these books this morning, and compare that Defendant's Exhibit No. 1 with the books?

(Document shown to the witness.)

A. Yes, sir.

Q. And did you make about three changes in pencil on Defendant's Exhibit No. 1?

A. Yes.

Q. And as changed is it a correct summary of the books of the Starved Rock Ferry Company in so far as they relate to the earnings of Thomas Desper?

A. Yes.

Q. Will you state whether or not the first column, does that indicate the total wages?

A. Yes, sir.

Q. And the second column indicates the money he actually received, the take-home-pay?

A. Yes, sir.

Mr. Shanner: If the Court please, I offer this in evidence as a summary of the books.

319 Mr. Davidson: You mean he has totaled it for each pay period?

Mr. Shanner: Yes, each time.

Mr. Davidson: I thought the man totaled it for the year.

Mr. Shanner: No, that was taken out of the books just

as it appears in the books.

Mr. Davidson: I would like to have a chance to check this. I think there should be some further information, your Honor, than the hours the man worked. He is giving it here between April 16th and May 17th.

The Court: You can cross examine about that. He merely says that is a summary of the figures he took from the books and the books are here for your inspection.

Mr. Davidson: All right, when that time comes, if I may, thank you.

The Court: Yes, sir.

Mr. Shanner: Any ruling on this now?

The Court: Yes, sir, it may be admitted.

(Which said document, so marked as Defendant's Exhibit No. 1 for identification, was thereupon received in evidence.)

320 By Mr. Shanner:

Q. I will hand you what is marked Defendant's Exhibit No. 2 for identification, which purports to be a photograph of this fire extinguisher and these parts, do you remember when that photograph was taken?

(Document shown to the witness.)

A. It was taken, I think, about a year or two after that.

Q. Will you state whether or not that photograph accurately portrays this extinguisher here?

A. To my knowledge, yes.

Mr. Shanner: I offer Defendant's Exhibit No. 2 in evidence, if the Court please.

Mr. Davidson: Might I suggest to counsel, he has, I notice, a whole series of photographs, when he finishes with those, if he wants to show them to the witness now, that we could look at them as a group.

The Court: I think that is a good suggestion.

Mr. Shanner: I was going to handle the next group, your Honor, as a group.

The Court: How many are in the present group?

Mr. Shanner: There are two, that is this and that one photograph.

321 The Court: That is the other one.

Mr. Shanner: There are no more photographs.

The Court: What are those?

Mr. Shanner: These are all in a group, these are the locks.

The Court: That is a different group, is that it?

Mr. Shanner: Yes.

The Court: All right.

Mr. Davidson: I would like to ask counsel then, with reference to this exhibit, your Honor, No. 2, why he is offering a photograph of the exhibit when we have the thing physically here itself? If we didn't have the cylinder, but we do have it and there is no claim that was not the cylinder and the testimony was accepted.

The Court: Maybe he can answer that, your question is directed to him.

Mr. Shanner: Well, I don't think it is a pertinent question. He didn't choose to offer the book as the exhibit, itself.

The Court: I thought it was offered.

Mr. Shanner: No, he didn't offer it.

322 Mr. Davidson: I thought we did. I certainly ask leave to offer them now, your Honor, the cylinder and all parts of it.

Mr. Shanner: If it is in evidence, I have no desire to offer the photograph.

Mr. Davidson: I thought it was in, if I didn't offer it—

The Court: If you didn't offer it, you do so right now?

Mr. Davidson: Yes.

Mr. Shanner: Then I withdraw Exhibit No. 2, and I take it you are allowing that in evidence?

The Court: Yes, sir, and the physical exhibit is in evidence.

Mr. Shanner: Together with the various nuts and washers?

The Court: Yes, he has them all marked, I know.

Mr. Shanner: I know he did but he kept referring to them with this witness from the company.

The Court: Well, they are in evidence.

323 (Which said items, marked as Plaintiff's Exhibits Nos. 6, 7, & 8 for identification, were thereupon received in evidence.)

By Mr. Shanner:

Q. Now, I hand you a group of photographs, Mr. Claudnic, and ask you if you have seen these over in my office, didn't you?

(Documents shown to the witness.)

A. Yes, sir.

Q. I ask you to take a look at them first and then tell us, first, on or about when these photographs were taken.

A. They were taken around in the early part of the spring, the following year.

Q. The year following the accident?

A. Yes.

Q. Is each and every one of those photographs which are Defendant's Exhibits 2 to 15, inclusive, correctly and accurately represent either the landing barge or the interior of the landing barge, or the launches, or the water, and show what they are supposed to represent?

324 A. Approximately the same thing.

Mr. Shanner: Then I offer these in evidence, your Honor, as Group Exhibits 2 to 15.

Mr. Davidson: Your Honor, we have no objection to these photographs so far as they throw any light on the situation.

The Court: They may be admitted

(Which said documents, so marked as Defendant's Exhibits Nos. 2 to 15, both inclusive, were thereupon received in evidence.)

Mr. Shanner: Well, they throw as much light as yours.

Mr. Davidson: Maybe more.

By Mr. Shanner:

Q. Now, Mr. Claudnic, will you take a look at the one here which has been marked Defendant's Exhibit No. 3, will you state whether or not this is the landing barge that we have referred to?

A. Yes, sir.

(Document shown to the witness.)

Q. Will you hold that up please so the jury can see it? Now, so we can all get oriented, will you state some-
325 thing by way of directions? That is, for instance, which way is the boat laying in the water?

A. Well, it is about north and south, approximately north and south.

Q. Which way is north and which way is south on there?

A. This is north and this is south (indicating).

Q. The River is down there to the south, isn't it?

A. That is it.

Q. This would be east this way and that would be west (indicating)?

A. No, it is not—south, this would be west, the way you look at the barge, this way it would be about southwest.

Q. Now, you are getting me completely confused. Let us take another look. Well, this is on the barge looking

southwest, that is the barge looking southwest, is that correct?

A. That is correct.

Q. Now, look at No. 12 and state whether or not that is the body of water known as Edwards Run?

A. Right.

Q. Will you look at No. 11 and state whether or not this is the railroad or the tracks that have been referred
326 to that run down on the other end to Consumers Run?

A. That is it, that is right.

Q. And No. 10, what is that?

A. That is one of the boats, the inside of one of the boats.

Q. By one of the boats you mean—

A. The ferry boats.

Q. One of the ferry boats. And No. 5 is what view? Hold those so the jury can see them.

A. That is part of that Edwards Run.

Q. Is this where the creek comes in up towards the front of the picture?

A. Yes, this is the creek coming in here.

Q. Now, what is between Edwards Run and Consumers Run?

A. A body of land.

Q. How far apart are they where each joins the River?

A. They join at the River.

Q. Now what, if anything, is there in Edwards Run with reference to piles, docks, or any facilities for the tieing up of vessels?

A. None.

Q. Is there anything of that kind?

327 A. No.

Mr. Shanner: I believe that is all, your Honor.

Cross Examination.

By Mr. Davidson:

Q. Do you have those payroll books here?

A. No.

Mr. Shanner: They are all on the table.

By Mr. Davidson:

Q. Mr. Claudnic, did you keep these books yourself?

A. Well, them there, no. Mr. Birkenbuel.

Q. As I understand it, you went through these books and you took out information shown in the books as to what the pay checks to Thomas Desper, Jr., were?

A. I checked them with the book.

Q. Now, I notice for example a pay check dated December, or refers to a pay check dated December 15th, 1947, was he paid a number of days after the end of the week or the two week period for which the pay was computed, is that the way it was done?

A. Well, he didn't work the full two weeks, that is when he was paid up to.

Q. Well, you have come to 1948; I notice you have
328 an entry where he was paid on April 16th, 1948, and then you don't show any check until May 17th, a month later, 1948.

Now, he worked sometime after April 16th, did he not?

A. He was killed.

Q. I understand he worked sometime after April 16th, isn't that true?

A. I can't recollect without looking at it.

Q. I just want to get that one thing clear, Mr. Claudnic. Let me show you the book for 1948. Now, during the week beginning on April 5th, that is Monday, is that right?

A. Yes, sir.

Q. He worked every day until Saturday, April 10th?

A. That is right.

Q. Take the next week, beginning Monday. He worked Monday, he didn't work Tuesday, he worked Wednesday, Friday and Saturday?

A. Well, this was the pay period, this was the end of the pay period, the 15th, that was the end of the pay period.

Q. What I want to get at is this; he worked every day including Saturday?

329 A. Right.

Q. He was then getting $1.25 an hour?

A. I don't know how that comes in there, it comes out $1.20, I don't know what there was about it, it was figured at $1.20.

Q. Is that Mr. Birkenbuel's handwriting, the $1.25?

A. That is from Mr. Birkenbuel.

Q. Now, his brother Jim Desper was doing the same kind of preparation work, is that right?

A. Yes, sir.

Q. His pay was $1 an hour, is that right?

A Yes, sir.

Q. Go over to the next page, then he worked on April 19th, 20th, 21st, 22nd, 23rd and 24th, is that right?

A. Yes, sir.

Q. He worked 48 hours that week?
A. That is right.
Q. When is the next day?
A. That was Monday, that was the day of the accident.
Q. He worked on Monday, April 26th, five hours?
A. Yes
Q. This check he got sometime later in May was for the work he had done prior to that?
A. This was it, yes.
330 Q. That represents the work he did prior to his death?
A. Yes, sir.
Q. Were you present when these photographs were taken?
A. Yes, sir.
Q. Do you know the date they were taken?
A. No, I don't.
Q. Can you give us the month?
A. No, the only thing I could say, I think they were taken in March, that is about the only thing I could say.
Q. Were these preservers treated and renovated each year in order to be used in the boats?
A. No.
Q. And in order to use those ferry boats, were there regulations of the coast guard which required that you retain life preservers in the boats?
A. Oh, yes.
Q. Just one more question, Mr. Claudnic; you were asked several questions here about the basis on which Thomas Desper was employed, I want to ask you one more question on that subject, sir. When you testified at the inquest didn't you also answer this question—
Mr. Shanner: At the inquest?
331 Mr. Davidson: I beg your pardon, at the Industrial Commission hearing:
By Mr. Davidson:
"Q. So far as you know, Tom Desper, the deceased in this case, was to be used as an operator during the season of 1948,"
is that correct?
A. Yes.
Q. Did you answer, "Yes, that is right"?
(No answer.)
Mr. Davidson: That is all.

Mr. Shanner: I think that is all, your Honor.

Mr. Davidson: I might ask one more thing, Mr. Claudnic:

By Mr. Davidson:

Q. The boats went into the water following this accident on the second Sunday in May, did they not?

A. I think so.

Q. Pardon?

A. I think so, I don't know exactly without—

Q. Let me see if I can refresh your memory on this subject, sir.

At this same hearing were you asked this question, sir:

332 "Q. Now, the boats began operation the second Sunday in May, is that correct?

A. Yes.

Q. That was on May 9th, was it not?

A. Yes.

Q. Now, did you also state that before the boats began regular operations on May 9th, you had them in the water and they had trial runs for a few days before that time?

A. Yes.

Q. So that within a week or ten days after the accident you had commenced trial runs with these boats in the water, is that true?

A. Approximately.

Mr. Davidson: That is all.

Redirect Examination.

By Mr. Shanner:

Q. I have another question or two: when you would move one of these launches out into the water—hold it over there, will you, I am talking about this launch that is up next to the landing barge, in what manner did you operate the launch in the water?

A. We would use power and we would also have a 333 few men on there with poles, to give us help in case we got stranded.

Q. What is the draw on a launch, that particular launch?

A. Well, you have got to have at least two feet of water in order to get in, to float it in.

Q. What would happen to the propellor when that would go in like that?

A. Well, the propellor just throws off mud, we are just cutting up mud.

Q. Now, to refresh your recollection, if I can, do you know or remember whether or not these photographs, all of them, were taken on April 26, 1949, exactly one year after the date of the accident?

A. Well, I couldn't be positive on the date, but they were a year after.

Q. That doesn't refresh your recollection. One other question, Mr. Claudnic: as you were working there, as the Starved Rock Ferry Company was operating there in April of 1948, what was the fact as to whether or not there was any ships discipline?

A. No.

Q. By "No," you mean what?

A. There was none, just the same, we worked just
334 the same way as you would in a factory or any other place, we didn't have any regulations so far as discipline is concerned.

Mr. Shanner: I think that is all.

Recross Examination.

By Mr. Davidson:

Q. You didn't stand any watches on these boats?

A. No, sir.

Q. This boat that you spoke of, that is one of your regular ferry boats in the water alongside of that house boat, is that true?

A. Yes, sir.

Q. Did you say the propellor extends into the water for some distance?

A. Yes, sir.

Q. Does it extend below the flat bottom of the boat?

A. A quarter of it sticks below the boat bottom.

Q. I am sorry, I didn't understand you.

A. About one-quarter of that sticks below the bottom of the boat.

Q. About how far below does it take the propellor?

A. About six inches or eight inches below the bottom of the boat.

335 Q. Do you have a rudder on the boats?

A. Yes.

Q. How far below the boat does it go?

A. It is approximately the same.

Q. You don't know whether the boat got in under its own power or not?

A. It digs its own way in, under its own power, yes.

Q. You mean it forces its way in there under its own power through mud and water?

A. Yes, the front end would cut it, cuts its own way in through the mud.

Q. You remember the boat going in in March and April, 1949?

A. Yes.

Q. What were the circumstances, how did the boat happen to go in that part of the year?

A. We put them in every year that way in order to dredge in, go so far and drive the craft through the mud and dredge the water in.

Q. What is the boat in the water for, is it prepared for operation?

A. It is in the water, it is still not operating, we still have to install equipment on it before we can use it.

336 Q. The remainder of the work to be done can be done while the boat is in the water?

A. Yes, sir.

Mr. Davidson: That is all.

(Witness excused.)

Mr. Shanner: Mark these Defendant's Exhibits 16, 17 and 18 for identification.

(Said documents were marked as Defendant's Exhibits Nos. 16, 17 and 18, respectively, for identification.)

Mr. Shanner: I would like to make this offer of proof before the Court.

The Court: All right, the jury may take a recess.

Mr. Shanner: Any objection to them taking the pictures, now?

Mr. Davidson: That is perfectly all right.

(Whereupon the Jury retired, after which the following proceedings were had in open court in the absence of the jury:)

Mr. Shanner: In view of the remark the Court made when we started picking the jury, I thought I had better do this in the absence of the jury.

337 If the Court please, I want to make this offer in the absence, and outside of the presence of the jury,

because of the statement the Court made at the time you were ruling on my motion for leave to file an amended answer today, if I interpret your statement correctly, it was to the effect the Compensation Act of Illinois had no bearing in this particular case:

I offer in evidence Defendant's Exhibit No. 16 which is a certified copy from the Industrial Commission of the State of Illinois of the certificate of insurance filed by the defendant in this case under the Workmen's Compensation Act which, under the statute, referred to in the exhibit itself, amounts to an election of the Act on the part of the defendant in this case, as an election to be bound by the terms of the Act.

I believe it is material, your Honor, it goes to the importance to the question of whether or not the parties in a law suit in the Federal Court have or have not elected to come under the Workmen's Compensation Act of the particular State.

I offer in evidence Defendant's Exhibit No. 17 for identification which is the application for adjustment of
338 claim signed or purportedly signed by the plaintiff in this case. It is offered partially at least on the theory that a pleading in another action is generally admissible in the action in which it is offered as an admission against interest.

That is purportedly signed by Anna Desper, this plaintiff, and attached to that is the award of the arbitrator in favor of the plaintiff in the compensation proceeding in which he makes a finding of fact that the parties were bound by the Workmen's Compensation Act law. That is offered upon the theory of estoppel by the record, it is a petition which they filed, your Honor, and it is an estoppel by record as set up in the original pleading which is still on file in this case.

Third, I offer in evidence Defendant's Exhibit No. 18 for identification which is a demand for compensation served upon this defendant purportedly signed by this plaintiff in which she sets out that deceased was then working under and subject to the Workmen's Compensation Act of Illinois. It is also offered as an admission against interest, signed by this plaintiff or purportedly signed by her.

339 They are all certified copies of the records of the Industrial Commission of the State of Illinois.

Mr. Sullivan: The Court has had all of these questions

before it in ruling on the Defendant's motion to stay proceedings.

Just to refresh the Court's recollection, the question of the exhibit which is the arbitrator's findings, under the rules of the Commission and in the words of the Industrial Act itself, the decision of an arbitrator which has been appealed for review, is a nullity;

As far as the suggestion offered by counsel that it is an estoppel by record of a judgment, because when a petition is filed the matter is kept in abeyance. Now, if the time for the review was all passed, then the decision of the arbitrator would become the decision of the Commission, the Illinois Industrial Commission, and so we object to that exhibit.

The exhibit wherein plaintiff in this case filed an application for adjustment of claim we believe has no bearing. We can show the Court several cases where plaintiff claimed has a right to file both in the Federal Court and under the
340 Illinois Industrial Commission, within that Act, it has never been held to be an admission and has never even been raised in any of the cases I have read.

One Illinois case, a recent Appellate Court decision, goes so far as to say even when the money is received and accepted by the claimant, he may still prosecute an action under the Federal Employer's Liability Act. That is how the Courts are construing concurrent actions, and the last one was November 18th, wasn't it?

Mr. Shanner: Yes, that was a claim for compensation, that was where the demand for compensation to comply with the Act must be filed within six months of the date of the injury or death.

Mr. Sullivan: We will admit, your Honor, that we have filed with the Commission and that the arbitrator has ruled. However, we say that it is of no moment in this case and should not be given to the jury, certainly as an admission it would be clearly inadmissible. We object to all three exhibits on the grounds stated although we will admit the claim was filed.

The Court: These matters raise the same questions that were raised when the preliminary motions were heard in this matter, whether or not these activities
341 before the Industrial Board is a bar to the present litigation.

Mr. Shanner: No, I am not offering them for that purpose, your Honor. I am asking the application for adjust-

ment of claim, which is No. 17 before your Honor, be admitted as an admission against interest.

Now, I do not contend, as counsel said, that she does not have the right to prosecute her claim in both courts at the same time, I have never contradicted that, but she has prosecuted it in both courts at the same time, and I think we have a right to show in this court, as an admission against interest, that she is in prosecuting in another jurisdiction. We are not claiming that that bars this proceeding.

The Court: Why do you want to show that?

Mr. Shanner: For the same reason, for showing any admission against interest.

The Court: How does it affect this law suit?

Mr. Shanner: Well, as she herself claims, she cannot be under the Illinois Compensation Act and under the Jones Act.

The Court: Why not?

Mr. Shanner: Because they are mutually exclusive.

The Court: No. If the Illinois action had gone on
342 to its final stages there, for instance if the action had been pushed as far as it could be pushed in the State court before this action was filed, I think the action here would be barred by that activity.

Mr. Shanner: That is true.

The Court: Well, you don't have that situation here.

Mr. Shanner: Suppose the Court found she was under the Illinois Act?

The Court: They would have to find that or else they wouldn't have anything.

Mr. Shanner: There would be an award against the defendant.

The Court: Let us assume it was in her favor.

Mr. Shanner: Well, that would be a bar, but I am not offering that as res adjudicata.

The Court: I understand you are offering that as a declaration against interest, what I am trying to find out is what interest is she declaring against?

Mr. Shanner: She is declaring over her signature here that her boy Tom and this defendant were operating that business and his employment under and subject to the Workmen's Compensation Act of Illinois.

The Court: It is raising that question in a different fashion.

343 Mr. Shanner: If, in fact, he was under the Work-

men's Compensation Act of the State of Illinois, he cannot be under the Jones Act, he cannot be under both of them.

The Court: I think she could proceed before the Industrial Commission under the Compensation Act of Illinois and then come into this proceeding.

Mr. Shanner: She is proceeding on both.

The Court: Certainly she has a right here.

Mr. Shanner: We don't dispute her right to come into this court. We are asking your Honor to admit the pleadings in that case in this court, under the rulings of the Circuit Court of Appeals. Suppose they have a right to be in here, yet you can show as a matter of evidence an admission against interest and this is an admission against interest in a pleading she has filed in the State courts, not the Federal courts.

The Court: Your motion is to admit them?

Mr. Shanner: Yes, sir.

The Court: You object to them?

Mr. Sullivan: Yes, sir.

The Court: Objection sustained.

Mr. Shanner: That completes my case, your Honor, except for the calling of this Court Reporter down in 344 Ottawa, I suppose, who took the Coroner's inquest.

The Court: You want to call that Reporter or can you agree to it?

Mr. Davidson: I think we can agree, will you read me the specific questions and answers?

Mr. Shanner: The first he admitted making the reply and then the last question was:

"You don't remember anything you said down there, do you?"

He said, "No, I don't."

The Court: What do you say now?

Mr. Davidson: The Court Reporter would testify to that if he were here.

The Court: Were here.

Mr. Shanner: That he or she, whichever it is, if present here would testify that he or she took notes in shorthand, later transcribed them, and he was asked this question:

"Can you tell us the cause of this explosion?

"Answer: I couldn't, at the time my back was turned.

"Question: Anything further you know about this accident?

"Answer: No, sir.

345 "Attorney Herbelsheimer: Mr. Birkenbuel was examining the extinguisher in what way, turning the cap?

"Answer: He was reading the instructions when I saw him, I thought it was instructions but it turned out it wasn't."

The Court: Is that what you say is material?

Mr. Davidson: My associate suggests a further objection.

The Court: There will be no further objection. We will bring the Reporter up here.

Mr. Davidson: Oh, no, we will agree if the Reporter were brought here these would be the questions and answers taken down, we object only on the proposition that these questions and answers are impeaching.

The Court: That is something else. You did not talk about that before.

Mr. Davidson: A question along these lines is a blanket question which I submit is not an impeaching question at all: "Anything further you know about this accident? No, sir." The witness is not asked in detail to tell what he did know, and he is only asked a half a dozen questions and answers.

The Court: Well, then, what is the argument about?

346 Why bring the Reporter up here to testify to it, if he or she would testify as counsel indicates? You did not object at the time the witness was here, that it was not impeaching, but we will let him bring the stenographer up and put in the evidence.

Mr. Davidson: I am not objecting about that.

The Court: Your objection about not being impeachment amounts to that. You should have objected when the witness was on the stand.

Mr. Shanner: Do you object to my reading this?

Mr. Davidson: No.

The Court: Only three or four questions and answers?

Mr. Davidson: That is all.

The Court: Can we have the jury brought in?

Mr. Shanner: Yes, sir.

(Thereupon the following proceedings were had in

open court in the presence and hearing of the jury, to-wit:)

The Court: All right, Mr. Shanner.

Mr. Shanner: It is stipulated between counsel that if Veronica L. Boyle were present and testified that being under oath she would testify that she is a stenographer and that she took the testimony at the inquest over the
347 body of Charles Birkenbuel held on April 30th, 1948, in Ottawa, in the County of La Salle in the State of Illinois and that she took the testimony down in shorthand and transcribed the same into typewriting and she would testify that her shorthand notes show that Robert Kennedy, among other things, testified as follows:

"Question: Can you tell us the cause of this explosion?

"Answer: I couldn't, at the time my back was turned.

"Question: Anything further you know about this accident?

"Answer: No, sir.

"Attorney Herbelsheimer: Mr. Birkenbuel, was examining the extinguisher in what way, turning the valve?

"Answer: He was reading the instructions when I saw him, I thought it was instructions and it turned out it wasn't."

The Defendant rests, your Honor.

THEREUPON DEFENDANT RESTED ITS CASE.

Mr. Davidson: No rebuttal, your Honor.

THEREUPON PLAINTIFFS RESTED THEIR CASE, IN REBUTTAL.

348 (The above and foregoing was all the evidence, offered, heard or received, upon the hearing of the above-entitled numbered cause.)

The Court: Then we will have some matters to discuss with you gentlemen and the jury might as well go home until tomorrow morning at ten o'clock, better make it ten-thirty.

(Then ensued argument on Defendant's motion at the end of all the evidence to exclude and direct.)

(At this point insert arguments on objections to instructions—already written up.)

349

IN THE UNITED STATES DISTRICT COURT

* * (Caption—No. 49 C 481) * *

Before Judge Igoe and a Jury,
Tuesday, April 25, 1950,
10:30 o'clock a.m.

Court met pursuant to adjournment
Parties Present:
Mr. Ryan,
Mr. Davidson,
Mr. Sullivan,
Mr. Shanner.

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350 (The following proceedings were had out of the presence and hearing of the Jury:)

DISCUSSION ON PROPOSED INSTRUCTIONS.

The Court: Well, we will take plaintiff's first, start with A. What is the objection to A?

Mr. Shanner: The objection to A, your honor, is directed to the middle of the second paragraph of the instruction which includes the 1939 Amendment to the Federal Employers Liability Act, which has no bearing at all in an action brought under the Jones Act for the reason that commerce between the States or interstate and foreign commerce is not now and never was an issue in determining whether a man was a member of a crew and thus entitled to prosecute under the Jones Act.

The Court: This is the 1939 Amendment in here?

Mr. Davidson: That is right.

The Court: What do you say about that?

Mr. Davidson: That was enacted as a part of the same section preceding it, your Honor, both sections referring to the fact that where a statute is based upon the fact there must be commerce between the States, the Jones Act
351 adopts and bases itself entirely on that Federal statute and, without that, we would have no right of action.

We must rely on the Act as it now stands; the Amendment was incorporated in the original Act as it was on the books and I submit does extend to the benefit of seamen, if they are seamen, and of course it simply muddies the waters to talk about interstate commerce as counsel does,

because Congress passed the statute and substituted it in the Jones Act, substituting instead of interstate commerce the test of navigation.

The Court: That was discussed before. What other objection do you have to A?

Mr. Shanner: No more to A.

The Court: Overrule that objection.

Mr. Shanner: As to B, I object to the entire instruction. I object to the first paragraph, taking it paragraph by paragraph, I object to the first paragraph because it is not the law that if anyone is doing business in furtherance of navigation or directly or closely and substantially affecting navigation, that is under the Jones Act or the Merchant-Marine Act of 1920, and that test is whether he is a member of the crew of the vessel engaged in, employed in navigation.

352 If this were the law, your Honor, someone working in a shipping office down here on La Salle Street would be under the Jones Act. Now, there is a distinction between the Jones Act and the Federal Employers Liability Act in a railroad case, by virtue of the '39 Amendment.

The Court: Let me read this. And your argument is—

Mr. Shanner: My argument is, number one, that it doesn't state the law because, under the law, one who is working in furtherance of navigation or directly or closely doing something which substantially affects navigation is not, as a matter of law, within the Jones Act. He must be a member of the crew on a vessel engaged in the course of his employment.

As I say, an employee in a shipping office, your Honor, might be doing some very closely allied work or directly and substantially affecting navigation, but he is not a seaman. That is why this 1939 Amendment has no application at all, because it cannot make someone a seaman who is not a seaman. That is my first objection to this.

The Court: You say this is inclusive enough to take in an office employee?

Mr. Shanner: Surely it is.

353 The Court: I don't agree with that.

Mr. Shanner: Well, he says if the defendant, in operating ferry boats, was in the furtherance of navigation or directly and closely and substantially affecting navigation, I say if that is true that anyone who does anything

in the furtherance of navigation or directly or closely or substantially affecting navigation, would be under the Jones Act.

Now, the second objection which is tied into that, is that this applies to what he does in the summer, and is not based on the evidence of what he was doing at the time of his injury and death; what he was to do in the summer has no bearing on the case and whether or not he would have been around and under the Jones Act in the summer, which this instruction seems to want to cover, has nothing to do with this case.

My further objection to that instruction is that it is misleading because they say it was in furtherance of navigation or directly or closely and substantially affects navigation. I think that is misleading, no jury would understand that.

Mr. Davidson: Our response to that is based on this proposition, your Honor: first, we have in the language of the Federal Employers Liability Act, as adopted by
354 the Jones Act and they have amended it by adopting the language, despite what counsel says, and they have held that Act should apply to seamen, and we ask the Court to tell the jury, as a matter of law, that when operating its ferry boats on the Illinois River, there is an Act that is closely and substantially affecting navigation and directly in furtherance of it, that that has application within the meaning of the Merchant-Marine Act and that the operator is a seaman within the meaning of that Act.

I think that follows as a matter of law. I don't think counsel can take any other position in this case, that the operator of the boat, while actually on the River, is not a pilot or operator within the Act. We have divided it up into three propositions, first telling the jury, as a matter of law, while actually operating on the River, he operates under the Act, and secondly, in the second paragraph, if they believe he was employed, say, for the season of 1948—

The Court: The second paragraph?

Mr. Davidson: Paragraph 2 of the same instruction.

The Court: Let us confine ourselves to Paragraph 1.

Mr. Davidson: Well, Paragraph 1 as it stands is a statement by the Court telling the jury that, under the
355 Jones Act, one operating one of these boats on the River, is a seaman under the meaning of the Merchant-Marine Act.

I don't think there is any room for a jury of reasonable persons to draw any other conclusions or, putting it another way, I think it is a question of law the Court will have to pass on and that is why I have stated it as I did in the instructions.

The Court: Of course that has to do with the operation of a boat after it gets into the water.

Mr. Davidson: That is right, your Honor.

The Court: This boat never reached that step, had it?

Mr. Davidson: Not at the time of the occurrence, it had not, but if our theory is sound, if it is true under the 1939 Amendment, then they must find him, under the Act, if any part of his duties in his employment would bring him into navigation under the statement of the Court as set forth in Paragraph 1.

In other words, you say, if you find he was employed for the year 1948 as an operator and any part of his duties would take him into these boats and onto the Illinois River, then he, at the time he was hurt, was operating under and within the meaning of the Merchant-Marine Act.

356 The Court: Well, let us talk about the rest of it. You have some further objections to the rest of it?

Mr. Shanner: Oh, yes, I object to the second paragraph, your Honor.

The Court: That kind of makes the first one more intelligent, doesn't it?

Mr. Shanner: Well, it makes it more intelligent and also makes it worse.

The second paragraph, as he says, embodies as a matter of law their theory that the 1939 Amendment to the Federal Employers Liability Act is applicable in this case. Of course, I contend that it is not and naturally contend that it is not because commerce between the States has nothing whatever to do with whether or not this man is a seaman.

But even if their theory is right, it is a question of fact for the jury and not a question of law for the Court to instruct them, if Tom Desper was doing something, at this time, in furtherance of navigation, then he is, as a matter of law, under the Jones Act.

Your Honor indicated quite to the contrary in your ruling on my motion, that it was not a matter of
357 law, as I understood it, and it was a matter of fact and would warrant the case going to the jury.

The Court: That is not what he is doing here.

Mr. Shanner: No, because you are seeing it as a matter of law.

The Court: Which part of it? If they find from the evidence?

Mr. Shanner: Yes, that he was aiding in the work of readying and fitting out defendant's said ferry boats and equipment for the season of 1948, there is no question that is what he was doing.

The Court: Well, that is their theory of this law suit. If they can't sustain that theory, they don't have any law suit.

Mr. Davidson: That is the whole thing in a nut shell.

Mr. Shanner: The instruction goes even further than their theory because the instruction tells the jury as a matter of law if this man was doing what he was doing, and nobody disputes that, then he is under the Jones Act. I understood your Honor to rule earlier that whether he was a member of a crew injured in the course of his employment was a matter of fact, not of law.

The Court: Don't they leave the factual finding 358 here to the jury?

Mr. Shanner: I don't think they do.

The Court: Maybe I don't read it right. They say if they believe from a preponderance of the evidence that he was employed to operate ferry boats, to do all those things.

Mr. Shanner: There is no question he was doing those things.

Mr. Davidson: Do you admit he was employed by the season?

Mr. Shanner: No, I don't.

Mr. Davidson: Then you do not admit that and that is why we have to have the jury pass on it.

Mr. Shanner: I do admit he was doing all these other things.

Mr. Davidson: We have to have him employed as an operator on our theory.

The Court: If they are wrong on that proposition, they are wrong so far as the whole case is concerned. That is the theory on which they are standing and if that is not good, from the standpoint of law, then I am wrong, too.

Mr. Shanner: Then, your Honor, the third paragraph

directs a verdict, if they find the defendant was
359 negligent, here it is submitted as a separate paragraph on the question of negligence and the question of damages.

Mr. Davidson: Well, I think perhaps we should modify that, your Honor. In view of his objection, may I have leave to do that?

I should like to say, if you believe at the time of the occurrence the deceased was operating under the terms and provisions of the Merchant-Marine Act, then the Court instructs you, and I shall modify it in that form, in view of counsel's objection, and I ask leave to do so.

The Court: Bring it back in the morning, and we will see what it looks like.

Mr. Davidson: All right, I will modify it.

The Court: What about C?

Mr. Shanner: I object to all three paragraphs, your Honor. I object to the first one, the first paragraph, because in the first place it is irrelevant as to whether or not the deceased was a seaman within the meaning of the Merchant-Marine Act during the summer, and

For the second reason, that it is repetitious. It is
the same thing in substance that is contained in
360 the first paragraph of Instruction B.

In the third place, of course, I contend that at the most it is a question of whether or not he would be a seaman within the meaning of the Act, under the facts you have assumed in the first paragraph of Instruction C.

Mr. Davidson: Your Honor, may I withdraw Instruction C? In some ways it parallels Instruction B, as counsel complains.

The Court: You are withdrawing C?

Mr. Davidson: I withdraw C, it is a terser statement of the proposition I think, but we will withdraw it.

Mr. Shanner: I object to D, your Honor.

The Court: What is your objection there?

Mr. Shanner: My objection is that it is not the law. The same objection as I made before.

The Court: Isn't that a repetition of something you have?

Mr. Shanner: That is the second objection, that it is a repetition of B.

The Court: You cannot give a general instruction con-

taining all these points and then add one giving each element separately, I don't think that is fair.

Mr. Davidson: Let us withdraw that, Judge.

361 Mr. Shanner: E. F. and G, I have no objection to. H is the same as one of mine, we can withdraw either one, it doesn't make any difference.

Mr. Davidson: H of ours is the same as 7 of his. It makes no difference.

The Court: Leave H in.

Mr. Shanner: I have no objection to any of the others. I believe some of these are covered in some of mine and we can withdraw them.

The Court: If they are, we will withdraw one or the other.

Mr. Shanner: Yes, sir.

The Court: You are going to correct B?

Mr. Davidson: Yes, we will correct B. your Honor.

The Court: In so far as the other objections are concerned, they will be overruled, and you are withdrawing C and D?

Mr. Davidson: Withdrawing them.

The Court: What do you have to say about his?

Mr. Davidson: As to number 4 of his, your Honor,—

The Court: 1, 2 and 3 you don't object to?

Mr. Davidson: No, I see no substantial objection to those.

The Court: Number 4.

362 Mr. Davidson: As to Number 4, your Honor, beginning at the fifth line from the bottom, the instruction advises the jury that they may consider the fact that contributions may vary or diminish in the future. I think it would be only fair, since the instruction is coming from the Court rather than either party, if counsel is going to ask for that, that the Court may say "vary, diminish or increase."

The Court: Where is that language?

Mr. Davidson: Just about the middle of the instruction, your Honor, just below the center, beginning with the word "may" at the beginning of the line.

The Court: You are looking at Instruction 4?

Mr. Davidson: Number 4.

Mr. Shanner: Does that start "in the event you find for the plaintiff—"

The Court: "You make take into consideration—"

Mr. Shanner: Yes, sir.

Mr. Davidson: It seems like a very argumentative instruction.

The Court: I do not seem to find the language.

Mr. Davidson: Beginning with the semicolon: "That their earnings may not remain stationary," that they may vary or diminish, I think you ought to say "or 363 increase in the future."

Here is a young man who was twenty-one years of age.

The Court: Do you agree to that?

Mr. Shanner: To what, Judge? To the change?

The Court: Decrease or increase.

Mr. Shanner: I have taken the words that are there, your Honor, from an instruction I think in the 163rd. Fed. 2nd., 396, in which it was held error not to give the instruction on that particular point when raised but that was not raised in that case.

The Court: It does not mean much, does it?

Mr. Davidson: I am not so sure about that last part, there have been instructions on that, I know.

Mr. Shanner: Let me make this suggestion to solve the difficulty—"to be expected contributions from them may vary in the future," leave out increase or decrease.

The Court: I think that ought to satisfy you.

Mr. Davidson: That ought to fix it. I am not sure but the last three lines of that instruction tells the jury that it is their duty to "reduce the ascertained proceeds of the probably future earnings of deceased to their present 364 worth." I have seen some cases on that.

Mr. Shanner: There are lots of cases on that.

Mr. Davidson: May I have overnight to look into that question? We may not object to it.

Mr. Shanner: The one I took that from is found in 184th Northwestern 927.

Mr. Davidson: I object to Number 5, your Honor, since that is contrary to the O'Donnell case in the 318th U.S. and of course does not fit our case at all.

Mr. Shanner: It is partly taken from the O'Donnell case and the rest is taken from Swanson against O'Mera, the last word of the Supreme Court on the subject.

Mr. Davidson: It cannot be sound law in a case with these facts and it ignores entirely the 1939 Amendment.

It asks the Court to say, as a matter of law, that the 1939 Amendment has no effect, counsel will have to concede the instruction cannot be good if he is giving any recognition to the statute.

The Court: You say he was injured while he was a member of a crew, don't you, of a vessel plying upon the navigable waters of the United States?

Mr. Davidson: Not directly, Judge, no, we do not. We say part of his employment was in navigation as a member of a crew of a vessel, not one, of four different
365 vessels, and the work at the time was practically not while used in actual navigation, but this test does not fit the facts in our case at all, it is not based on the evidence.

Mr. Shanner: It is not based on your theory, I am tendering the instruction on my theory in the case.

Mr. Davidson: The Court could not very well give both, both ours and his. His assumes, as a matter of law, that the 1939 Amendment has no application to the Jones Act and the man must actually be acting as a member of a crew on a vessel plying on the navigable waters of the United States when hurt.

Mr. Shanner: He must be in the course of his employment when hurt.

Mr. Davidson: Where you have a recovery for wages. That ignores these cases where the vessel is not plying at all. A vessel may be put in dry dock. That refers more specifically to the wage element. There could be no recovery in those cases, if that were the law.

Mr. Shanner: I leave it as a matter of fact, which you don't do in your instructions. I say they must believe from a preponderance of the evidence in the case, I give the jury something to do.

Mr. Davidson: We do not allege in our complaint
366 he was a member of a crew plying in navigable waters. We do not accept that as the crux in this case under the present statutes, and that attempts to impose a burden the cases do not authorize.

Counsel had cited no cases that hold this is the only condition where a man can recover, where he is operating as an active member of a crew after the boats here have gone through the fitting out or readying period a week before they are launched in the water, when all the work has been done on the boats.

If that were the law in this kind of case, it would probably be the Court's obligation to direct a verdict. That is not the situation here, because if any part of his employment is directly in furtherance and in aid of navigation or any part of his duties would be, he is a member of the crew on a boat in navigable waters and we are entitled to recover.

The Court: You charge he met his death in the course of his employment as a member of a crew?

Mr. Davidson: I don't think we go that far, your Honor: we say that he met his death in readying and fitting out these boats that he was going to operate on when they were launched. That is the substance of our allegation,
367 we do not claim he was actually serving as a member of a crew.

The Court: Your position is this narrows it down to where there is a situation where the boat was actually plying upon navigable waters?

Mr. Davidson: That is it.

The Court: I will sustain the objection to Number 5.

Mr. Davidson: There is no objection to 6; 7 is the same as our H.

Mr. Shanner: It is not 7, it is 8.

Mr. Davidson: No objection to the remainder of the instructions, your Honor.

The Court: We will take one out, which one?

Mr. Shanner: 7.

Mr. Davidson: Withdrawn.

The Court: Just tear that up, then.

Mr. Shanner: Yes.

The Court: Your 7 is negligence?

Mr. Shanner: Yes, that is the same one as H, I believe.

The Court: Oh, that is right. I understand there are no objections to the others?

Mr. Davidson: No, your Honor, no objections to the others.

Mr. Shanner: Do you have this one?

368 Mr. Davidson: As I understand, this man was a member of a crew in the sense he was the crew at the time and in the preparation and fitting out this boat, getting it ready for actual service in the Illinois River.

The Court: We have passed that now.

Mr. Davidson: I just wanted to amplify what I said to the Court; Mr. Sullivan thought I should amplify that point further to make our position clear.

Mr. Shanner: I think, Judge, he is getting afraid he is in pretty hot water as a matter of law.

Mr. Davidson: No.

The Court: What was that statement again?

Mr. Davidson: I said I wanted our position to be clear and correctly understood. We think we are on sound ground. We said the work was pertaining to fitting out the boats which were to be used in the immediate future and this work was part of the operation of the boats, but they were not in the water and we don't claim that they were.

The Court: He was around there readying the boats for navigation, that is your theory?

Mr. Sullivan: We do contend, Judge, that was part of the work of a member of the crew.

The Court: I understand that. What is the an-
369 swer to this question, that you say he is a member of this crew?

Mr. Davidson: This instruction is defective, he says the only reason the man can recover is because he was a member of a crew of a boat plying in navigable waters. This man was not plying in navigable waters.

Mr. Shanner: Then you have no law suit.

Mr. Davidson: Well, that is to be determined.

The Court: Plying the navigable waters, the Act of plying on the navigable waters of the United States, he would stay on the boat and eat there?

Mr. Davidson: Yes, he would.

The Court: All right, you will correct B and look that over between yourselves in the morning.

(Whereupon, an adjournment was taken in the above-entitled cause to the following day, Tuesday, April 25th, 1950, at 10:30 o'clock a.m.)

370

IN THE UNITED STATES DISTRICT COURT

* * (Caption—No. 49 C 481) * *

Before Judge Igoe and a Jury,
Tuesday, April 25, 1950.
10:30 o'clock a.m.

Court met pursuant to adjournment.
Parties Present:
Mr. Ryan,
Mr. Sullivan,
Mr. Davidson,
Mr. Shanner.

371 The Clerk: Desper versus Starved Rock Ferry Company, Case No. 49 C 481, on trial.

The Court: There is a juror missing.

Mr. Shanner: There are one or two instructions to be considered.

The Court: Oh, yes, that is right. Which instructions are these supposed to take the place of?

Mr. Davidson: The one consisting of two pages, your Honor, is to replace A.

The Court: What is the change?

Mr. Davidson: That is the one that was re-typed, rather B, your Honor, we made the following changes, your Honor, in it.

Mr. Shanner: I don't seem to have your instructions, or mine either. I left my pleadings on my desk.

The Court: No, that does not seem to fit in with B.

Mr. Davidson: Oh, the other one replaces B, a one-page instruction I tendered to the Judge, that replaces it.

The Court: The first paragraph, you were going to change.

Mr. Shanner: This is B.

Mr. Davidson: That is it.

The Court: You have just stricken out the last
371 paragraph, isn't that it?

Mr. Davidson: We struck that, yes.

The Court: That is what Mr. Shanner was objecting to, among other things.

Mr. Shanner: Among other things, yes.

Mr. Davidson: The other one you might call a definition of the issues, telling the jury what the complaint—what the complainant is charging in her complaint.

The Court: Well, your substitution for B now, as I understand it, is the same as B was with the exception you have stricken out the last paragraph?

Mr. Davidson: That is correct, your Honor, that is it.

The Court: Mr. Shanner still objects to it but that part of the objection you attempted to cure by striking out part of the instruction?

Mr. Shanner: Yes, sir. Does this take the place of any instruction or is this a brand new one?

Mr. Davidson: This last one which we have not yet lettered or numbered is a definition of the issues, that is a completely new one, your Honor.

The Court: Completely new one.

Mr. Davidson: This two or three page one.

The Court: You mean that is in addition to what you have already given?

372 Mr. Davidson: In addition to the others.

The Court: Oh, well.

Mr. Davidson: I think we are obligated to tender this for the plaintiff, several instructions say it is the duty of the plaintiff to prove the charges in the complaint and I think it is incumbent on us to tell the jury what those are.

The Court: You are just saying what the charges are in the complaint?

Mr. Davidson: That is correct, your Honor.

The Court: Now this does not take the place of some of your other instructions.

Mr. Davidson: I don't think I have any instruction in the entire set now, your Honor, where we say to the jury "If you believe the plaintiff has proven the following allegations, your verdict should be in her favor."

The Court: What about the last instruction you have here, the second paragraph?

Mr. Davidson: That deals with only one phase of the case, your Honor, the question whether the deceased was under the Merchant-Marine Act.

The Court: It is more than that, you say "If you believe from the evidence under the instructions" deceased was employed to operate ferry boats, and so forth, to

373 carry passengers.

Mr. Davidson: That is confined to a statement as to what tests the jury shall apply to determine whether

he was under the Merchant-Marine Act, the last one without telling the jury what the charges of negligence are, and informs them if they believe we have proven all these allegations including the negligence that they can find for the plaintiff. I think it is the only instruction we have based on the complaint, your Honor, directing a verdict.

The Court: Well, I take it you don't approve of this, Mr. Shanner?

Mr. Shanner: I object, your Honor, to the first part, that portion of it setting out the issues and the allegations in the complaint for the reason the instruction does not incorporate the answer of the defendant denying those substantial allegations and it has been held in the Illinois courts, I am not familiar with any Federal cases on the question, that although it is proper to give an instruction such as this defining the issues, the instruction must contain the denial of the defendant.

Mr. Davidson: That is not so. There are at least thirty cases we have had in the Appellate Courts where
374 we used this type of instruction. The defendant has the right, if he wants to, to set up his own allegations.

The Court: I understand, but it is only fair to say the defendant has denied all of these allegations.

Mr. Davidson: I have no objection to the Court stating that to the jury.

The Court: That is what we usually do. We say the defendant, in reply to these different allegations that are contained in the complaint, has specifically denied each and every one of them and that creates the issue that resulted in this law suit.

Mr. Shanner: If your Honor will so instruct the jury.

The Court: We will put that in before the last paragraph, we will just put in there that by your answer you have denied the different allegations contained in the complaint. That is the way we usually do it here.

Mr. Shanner: Well, I think that is the correct way.

Mr. Davidson: I think that is desirable practice. Very few defendants bother to tender such instructions in the State court.

The Court: It kind of makes a funny situation before the jury if they are not advised the defendant has denied all the allegations.

375 Mr. Davidson: Your Honor, I have tendered this but sometimes we have an additional instruction, that the following are merely allegations of the plaintiff herein and are not proof of the statements in the complaint.

Mr. Shanner: Then I object to the last half of this instruction marked L for the reason it is repetitious, number one.

Number two, it is invading the province of the jury because it is a jury question as to whether or not this deceased was under the Jones Act, and the instruction instructs the jury that if these facts are true that he was under it.

My third objection is that what he was to do during the season of 1948 has nothing whatever to do with the issues in this law suit, as substantiated by a number of cases that I cited yesterday.

The Court: Why do you say it invades the province of the jury? Don't they say, "If you find, from a preponderance of the evidence"?

Mr. Shanner: It says if they find from a preponderance of the evidence that he was aiding in and helping get these ships ready that he is under the Jones Act. That is where it invades the province of the jury, just like some of
376 these other instructions. There is no question, your Honor, it is undisputed here that he was helping getting these ferry boats ready for the summer season but even if that is true, under the most favorable theory of the case; from the plaintiff's point of view, it is unquestioned the fact whether he was a member of a crew of a vessel and comes under the Jones Act, even the Corumba case, your Honor, which is the most favorable case that plaintiff has cited, you see in that case the trial judge directed a verdict, they rev. sed and remanded it holding whether he was a member of the crew of a vessel is a question of fact for the jury.

The Court: Don't they leave that open here?

Mr. Shanner: No, they say if they believe from the evidence they were readying these boats they were under the Act.

Mr. Davidson: No, we say in the very next breath "If you believe he was so employed by the defendant to operate one of these ferry boats as crew of said vessel," that is one of the things I put in there.

Mr. Shanner: That is in the summer.

Mr. Davidson: We say, if that is part of his employment, to operate the vessel as the crew of the vessel upon navigable waters, and this is a question the Court
377 passed on yesterday. It is the same objection he is raising again.

The Court: He has that piece of evidence in there, where somebody said this man was employed for the season, in substance that is what it amounts to.

Mr. Shanner: He does not have the ship itself, your Honor, to make him a member of the crew.

The Court: Well, these cases are not at all certain as to just what constitutes the member of a crew. In the Corumba case there is language there that indicates this kind of situation might well come within that law. Whether this Court is going to sustain that situation or not, I don't know.

Mr. Shanner: The Corumba case does not adopt the 1939 Amendment to the Federal Employers Liability Act.

The Court: It does not disavow it, either.

Mr. Shanner: That Amendment has been in force for eleven years and he cannot cite a case that adopted the 1939 Amendment.

The Court: It seems nobody ever raised it before.

Mr. Davidson: We talked to Mr. Ryan this morning, we were discussing some other things, he is just getting back to town. He said he feels very strongly about the thing and he feels that the Amendment was certainly
378 a part of the Jones Act.

Mr. Shanner: That replaces the Longshoreman's Act.

Mr. Davidson: That will have nothing to do with it.

Judge, I wanted to ask about this one instruction, this Instruction No. 4, which tells the jury that they may consider that all persons do not live to the age of expectancy.

Now, there have been no mortality tables introduced in this case, there is no evidence of what the age of expectancy is and I wonder if that is a proper instruction.

It seems to me it is improper, coming as it does from the Court, suggesting somebody might die before the usual expectancy is reached.

The Court: Of course there is no proof here what the age of expectancy is.

Mr. Shanner: That is the language in one of the cases I read Saturday, Judge, I cannot tell you what case it is, it is a case like this, where there are one or two parents surviving, like this, and the reviewing court said since they were in front of the jury, in the presence of the jury, the jury could form its own theory how long they would live. Expectancy is not limited to any sort of a table.
379 That is, the jury may adopt the Biblical three score and ten as expectancy.

Mr. Davidson: And she might also live beyond the age of expectancy. Why should the Court say all persons do not live to the age of expectancy?

The Court: Age of expectancy, what does that mean to the jury?

Mr. Davidson: If he wants to limit it and say they may take into consideration her age and health, I have no objection to that.

The Court: Why not say "All persons do not live any specific number of years"?

Mr. Shanner: That is all right. I have no objection to that.

The Court: Why does that not take care of the situation?

Mr. Davidson: I think that will cover it, your Honor.

The Court: "All people do not live any specific number of years."

Mr. Davidson: If you think you want to tell that to the jury, Judge, I wonder what a reviewing court might think of it.

The Court: Well, that is a fact, isn't it?

Mr. Davidson: It is.

380 The Court: I don't know why they should object to it.

Mr. Davidson: In the last part of it, they have given that instruction in one case I found when there was no claim of any other pecuniary benefits other than the actual contributions from the earnings of the deceased. Here we have shown he rendered services of value to his mother about the house, which is part of her pecuniary loss. The instruction seems to ignore that one fact.

Mr. Shanner: Well, the instruction covers the fact of the earnings.

The Court: I think we will leave it, let the rest of it stand.

Mr. Davidson : I understand counsel will file an amended answer, your Honor, setting up the accident was due to the sole negligence of the defendant. I have prepared our reply which I would like to have filed, your Honor. I will tender it now and file it whenever defendant tenders the answer.

The Court: I understand he prepared an answer and will file it.

Mr. Shanner: I left it with the instructions.

Mr. Davidson: Is it agreed we may proceed, Mr.
381 Shanner, with the same effect as though your amended answer was on file?

Mr. Shanner: Yes, sir, my amended answer is like the original except the number of the paragraphs have been changed in the light of the allegations in Paragraph 4 of the Complaint.

382 (And Thereupon, At Conclusion Of Arguments Of Counsel, The Court Instructed The Jury, In Words And Figures As Follows, To-wit:)

The Court: Ladies and Gentlemen of the Jury, at this time the Court will read to you the instructions that shall govern your deliberations when you go into the jury room.

No. 1.

It is alleged in plaintiff's complaint that the defendant, Starved Rock Ferry Company, a corporation, whose principal place of business was at Starved Rock Park, LaSalle County, in the Northern District of Illinois, was in the business of operating ferry boats carrying passengers for hire on the Illinois River, a navigable river; that on and prior to April 26th, 1948, Thomas J. Desper, Jr., plaintiff's decedent, was a seaman employed as a river boat operator by the defendant for the year 1948 and to assist in the readying and fitting out of ferry boats of the said defendant to be used during the year 1948 in the Illinois River; that at the time of the accident in question, plaintiff's decedent, pursuant to said employment, was aid-
383 ing in the readying and fitting out of defendant's ferry boats for operation in the Illinois River, and that all or part of decedent's duties as said employee were in actual navigation, or so closely and substantially affected navigation as to be a part thereof within the meaning of the said Merchant Marine Act; that at the time and place of the accident in question the decedent and the

defendant were subject to the provisions of the said Merchant Marine Act; that plaintiff's action is brought pursuant to the provisions of the said Act; that on said date a large loading boat or barge, owned, operated and maintained by the defendant, was moored in Edward's RUN, a body of water in immediate proximity to the Illinois River, and the decedent was on said boat or barge, in the due course of his employment, near defendant's vice-principal who was engaged in manipulating a nut on a certain fire extinguisher being prepared for use on one of said ferry boats of the defendant.

It is further alleged in plaintiff's complaint that at said time and place the said Starved Rock Ferry Company, a corporation, defendant, by its agent and servant, was guilty of negligence in one or more of the following particulars:

384 Carelessly and negligently failed to provide safe appliances, and then and there carelessly and negligently permitted and allowed said fire extinguisher to be upon said landing barge in a defective, insufficient, unsafe and dangerous condition;

Carelessly and negligently and without proper precaution opened said fire extinguisher so that gas contained therein at a high pressure was released with explosive force;

Carelessly and negligently failed to warn the decedent of the danger attendant upon the removal of the nut on said fire extinguisher, when it knew or, in the exercise of ordinary care, could have known that such an operation would be attended with great hazard and danger to persons nearby;

Carelessly and negligently failed to exercise ordinary care to furnish plaintiff's decedent with a safe place to work, contrary to and in violation of the Merchant Marine Act.

It is further alleged in said complaint that as a direct and proximate result and in consequence, in whole or in part, of one or more of the acts of negligence, or omissions, as above set forth, the said fire extinguisher or parts thereof were propelled with great force and violence against

385 the decedent's body and inflicted injuries upon him which resulted in and caused his death on said date; that decedent left surviving him Anna Desper, his mother,

who is now living and has sustained pecuniary loss and damage as a result of decedent's death.

Those are the charges contained in the complaint which was filed in this law suit; the defendant has filed a reply to that complaint in which reply the defendant has denied each one of the acts of negligence charged by the plaintiff as having been committed by the defendant.

If you believe from a preponderance of the evidence and under the instructions of the court that the decedent was so employed for the season of the year 1948, during which the defendant usually operated its said ferry boats, as a ferry boat operator and to aid in the fitting out and readying of said boats for such use in navigation on the Illinois River, and if you further believe from the evidence that it was part of decedent's duties as such an employee of the defendant to operate one of said ferry boats as the crew of said vessel on navigable waters, and that in performing said duties the decedent would be engaged in actual navigation or in work so closely and substantially affecting navigation as to be a part thereof,

386 and if you further believe from the evidence that the defendant was at the time and place of said accident guilty of negligence in one or more of the particulars above set forth and as alleged in plaintiff's complaint, and that such negligence, if any, was a proximate cause or proximately contributing cause, in whole or in part, of said accident and death of plaintiff's decedent, then you should find the defendant guilty.

387 No. 2.

The Jury are instructed that it is provided by an Act of Congress, which was in force as a law at the time plaintiff's decedent came to his death, that every common carrier by railroad, while engaged in commerce between any of the several states or territories, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence,

in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

The said Act of Congress further provides that any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or for-
388 eign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

And another section of said act in full force and effect prior to April 26, 1948, provided that in all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee.

It is provided in another Act of Congress that any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in
389 case of the death of any seaman as a result of any such personal injury the personal representatives of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable.

In other words, they have a right and the law grants them the right of action the same as any railroad employees, under a statute which says that that law shall be applicable to the deceased if engaged in navigation upon a navigable stream.

390 No. 3

If you believe from the preponderance of the evidence, under the instructions of the court, that a duly

licensed operator operating any one of the ferry boats of the defendant, Starved Rock Ferry Company, a corporation, on the Illinois River, in defendant's business, during the regular season for such operation, was the crew of said vessel and engaged in actual navigation or in work which was so closely and substantially affected navigation as to be a part thereof, then the court instructs you that operation of said boats by a duly licensed operator employed by the defendant for said purpose would constitute said operator a seaman within the meaning of the Act of Congress known as the Merchant Marine Act; and the court further instructs you that under such circumstances said operator is the crew of the ferry boat.

The court further instructs you that if you believe from the preponderance of the evidence, under the instructions of the court, that the plaintiff's decedent, Thomas J. Desper, Jr., was employed by the defendant, Starved Rock Ferry Company, a corporation, to operate its ferry boats as a licensed operator for the season of 1948, and
391 commenced work for said company in March, 1948, aiding in the work of readying and fitting out defendant's said ferry boats and the equipment used on said ferry boats for operation on the Illinois River during the year 1948, in the carriage of passengers for hire, and if you further find from all the facts and circumstances in evidence that any part of the duties of Thomas J. Desper, Jr., deceased, as an employee of said company, was the operation of one of said ferry boats as the crew of said vessel on navigable waters and that his work as such operator would be in actual navigation or in work which so closely and substantially affected navigation as to be a part thereof, then you should find that he was subject to the provisions of the Merchant Marine Act at the time and place of the accident and injuries which caused his death.

392 No. 4

The Court also instructs the jury that if, from the preponderance of the evidence and under the instructions of the court, you find the defendant guilty, then you should fix the plaintiff's damages at such a sum as would reasonably compensate the mother of the decedent for the pecuniary loss, if any, shown by the evidence to have been sustained by her on account of the injury and death of decedent.

In estimating the amount, you are authorized to take into consideration the evidence showing the decedent's age,

habits, earning capacity and probable duration of life and the amount which the said decedent might reasonably contribute for the maintenance and support of his said mother, or other pecuniary advantage, if any, which you believe from the preponderance of the evidence, she would have received at any age of the life of decedent had the decedent lived.

393 No. 5 and 6

The degree of proof required of the plaintiff in this case is that she prove her case by a preponderance of the evidence. This means that upon the questions of fact which the plaintiff is required to prove she must have a greater weight, or preponderance, of evidence. But this rule does not require the plaintiff to prove any fact beyond a reasonable doubt; a fact is sufficiently proved if the jury find that the greater weight of the evidence is in its favor, still the proof need not be the direct evidence of persons who saw the occurrence or things sought to be proved, but facts may also be proved by circumstantial evidence, that is, by proof of circumstances, if any, such as give rise to a reasonable inference in the minds of the jury of the truth of the facts alleged and sought to be proved, provided such circumstances, together with all the other evidence bearing on such facts, constitute a preponderance of evidence.

394 No. 7

The Court also instructs the jury that negligence is the omission to do something which a reasonable person, guided by those ordinary considerations which ordinarily regulate human affairs, would do, or the doing of something which a prudent and reasonable person would not do.

395 No. 8

The term "proximate cause" wherever used in these instructions means that cause which of itself or in combination with other causes, in natural and continuous sequence, unbroken by any efficient intervening cause, produced the result complained of and without which the result would not have occurred. It need not be the sole cause, nor the last or nearest cause; it is sufficient if it concurs with some other cause acting at the same time, which in combination with it causes the injury.

396 No. 9

The court also instructs the jury that this case must be decided upon the evidence, under the instructions of the court, and not upon the statements of counsel, outside of

the evidence, unsupported by the evidence, if any such statements have been made. The evidence and the law alone must govern your verdict.

In considering this case and arriving at your verdict, you should not take into account or be influenced by any statement, declaration or remarks of counsel, if any such have been made, unless the same are based upon or are justly and fairly deducible from the evidence.

Any remarks made by counsel either during the trial or in their arguments to the jury and stricken out of the record by the court or to which objection has been sustained by the court, must be totally disregarded and treated as if they had never been made or heard by the jury.

397 No. 10

Neither by these instructions nor by any words uttered or remark made by the Court during this trial, does or did the Court intimate or mean to give or wish to be understood as giving, an opinion as to what the proof is or what it is not, or what the facts are in this case or what are not the facts therein. It is solely and exclusively for the jury to find and determine the facts and this they must do from the evidence, and having done so, then apply to them the law as stated in these instructions. The instructions given to the jury are and constitute one connected body and series and should be so regarded and treated by the jury, that is to say, they should apply them to the facts as a whole, and they must not detach or separate any one instruction from any or either of the others.

398 No. 11

The court instructs the jury that if you believe from the evidence that the plaintiff, as administratrix of the estate of Thomas J. Desper, Jr., deceased, has not made out and proved her case by the greater weight or preponderance of the evidence and under the instructions given by the court, she is not entitled to recover, then your oaths prohibit you from bringing in a verdict in favor of such administratrix for any sum of money merely because you may sympathize with her. This case must be tried according to the law and the evidence and not according to the sympathies of the jury.

399 No. 12

You are instructed that wherever the court uses the word "evidence" in these instructions the court means evidence which has been admitted by the court and has not been stricken out of the record. The jury must not consider any remark or statement made by witnesses or attorneys which are not supported by the evidence or by the law as given in these instructions. Any evidence that has been admitted and was afterwards stricken out by order of the court must be wholly disregarded, and the same as if it has not been heard, and the jury must not be influenced by any remarks or statements of counsel or witnesses which were heard by them and which were afterwards stricken out of the record by order of the court, and you must not draw any inferences from any remarks or statements made during the progress of this trial by any body where such remarks or statements were afterwards stricken from the record by order of the court.

400 No. 13

The court instructs the jury that, in case they find for the plaintiff, they can only assess pecuniary damages for pecuniary loss; and they cannot give any damages for the grief and mental suffering of the plaintiff, or any one else. The damages, if any, must be confined to the pecuniary loss which the evidence may show has been sustained by the mother of the deceased and should be such compensation as the jury may believe from the evidence is just and right.

401 No. 14

In the event you find for the plaintiff, in assessing the amount of her damages you may take into consideration her age and health and the decedent's age and health; and you may consider that all persons do not live any specified number of years and that they may not work during all of the years of their life; that their earnings may not remain stationary and that the reasonably to be expected contributions from them may vary in the future, and in fixing the amount of plaintiff's damages, if you believe, under the law and the evidence you find the defendant guilty, it is your duty to reduce the ascertained proceeds of the probable future earnings of deceased to their present worth and include only that sum in your verdict.

402 No. 15

If you believe from the evidence that the plaintiff's intestate was guilty of negligence which proximately contributed to cause his death, such negligence, if any there was, is not a defense in this case but, if you find the defendant guilty, you should reduce the amount of damages you award the plaintiff in proportion to the extent the deceased's negligence, if any, proximately contributed to his fatal injury.

403 No. 16.

The burden of proof is not upon the defendant to show that it is not guilty of the charges made by the plaintiff in the complaint, but the burden is upon the plaintiff to prove that the defendant is guilty, and also that this rule as to the burden of proof is binding in law and must govern you in deciding this case.

404 No. 17

You are instructed that if you should find the defendant herein not guilty, then you will have no occasion whatsoever to consider the plaintiff's damages.

405 No. 18

If you are in doubt or unable to say on which side there is a preponderance, then in either of these cases your verdict should be not guilty.

406 No. 19

The court instructs the jury that it is their duty to try this case and consider the defendant in all matters pertaining to this trial as though it were a natural person instead of a company. Companies are entitled to the same fair and unprejudiced treatment in courts of law as individuals are under like circumstances, and the fact that the plaintiff is an individual and the defendant is a company must make no difference with you, nor should any sentiment or prejudice, or feeling of sympathy, have any weight with you in deciding this case. It is your duty to hear and consider the evidence with the same fairness and impartiality and arrive at the same verdict as you would if the contest was between individuals.

407 No. 20

In considering the case and in passing upon your verdict, you are not required to set aside your own common observation and experience as men and women in the affairs of life, but, on the other hand, you have the right, upon consideration of all the evidence in this case, in the light of your own common observation and experience as men and women in the affairs of life, to say where the truth lies upon any issue in the case.

408 No. 21

Preliminary to your being accepted and sworn to act as jurors in this case, you were examined by both plaintiff and defendant as to your competency and qualifications to sit as jurors in this case. As a part of such examination, each of you answered all questions asked you by both plaintiff and defendant. Your answers showed that you were competent and qualified to act as jurors and the parties to this suit accepted you as jurors on the faith of your answers. The answers you then made to said questions in regard to your competency, fairness, qualifications, lack of prejudice and freedom from passion and sympathy are as binding on you now as they were then and should so remain until you are finally discharged from further consideration of the case. It would be improper for you to disregard the answers that rendered you competent jurors.

409 No. 22

You are the sole judges of the credibility of the witnesses, or the weight of the evidence, and of the facts. It is your right to determine from the appearance of witnesses on the stand, their manner of testifying, their apparent candor or frankness or the lack thereof, which witnesses are more worthy of credit, and to give weight accordingly. In determining the weight to be given to the testimony of the witnesses, you are authorized to consider their relationship to the parties when the same is proved, their interest, if any, in the suit, their temper, feeling or bias, if any has been shown, their demeanor on the stand, their means of information, and the reasonableness of the story told by them and to give weight accordingly.

409a The first thing you do, of course, when you reach

your jury room would be to select some one of your members as foreman and then thereafter proceed to deliberate and when you finally do arrive at a verdict you will sign one of the two forms submitted to you. The person selected by you as foreman will sign his or her name first and the other eleven jurors will affix their signatures thereafter.

The forms of verdict given to you are as follows:

"We, the Jury, find the defendant guilty and assess the plaintiff damages in the sum of ..... dollars and ..... cents,"

and in the event you find the issues in favor of the defendant and find the defendant not guilty, you will sign this form of verdict:

"We, the Jury, find the defendant not guilty."

Swear the Marshal to take charge of the jury, please.

(Marshal sworn and jury retires to the jury room.)

410 It is understood, gentlemen, if the jury, before the jury finally retire, that you agree the objections made to the different instructions at the time you discussed them, out of their presence, shall stand as though made before the jury retired?

Mr. Shanner: Yes, sir.

The Court: We will let the record show they have been repeated as at the time we discussed them.

Mr. Shanner: Yes, sir.

The Court: In the event the jury come in, you want them to call you up?

Mr. Davidson: I would appreciate it very much.

The Court: Then the jury may separate, seal their verdict, and it will be read tomorrow morning, and you waive the polling of the jury?

Mr. Shanner: Yes, sir, the Marshal will inform us?

The Court: Yes, sir, he will call you up.

(The Above And Foregoing Was All The Evidence Offered, Heard Or Received Or Other Proceedings Had Upon The Hearing Of The Above-Entitled Numbered Cause.)

411

IN THE UNITED STATES DISTRICT COURT

* * (Caption—No. 49 C 481) * *

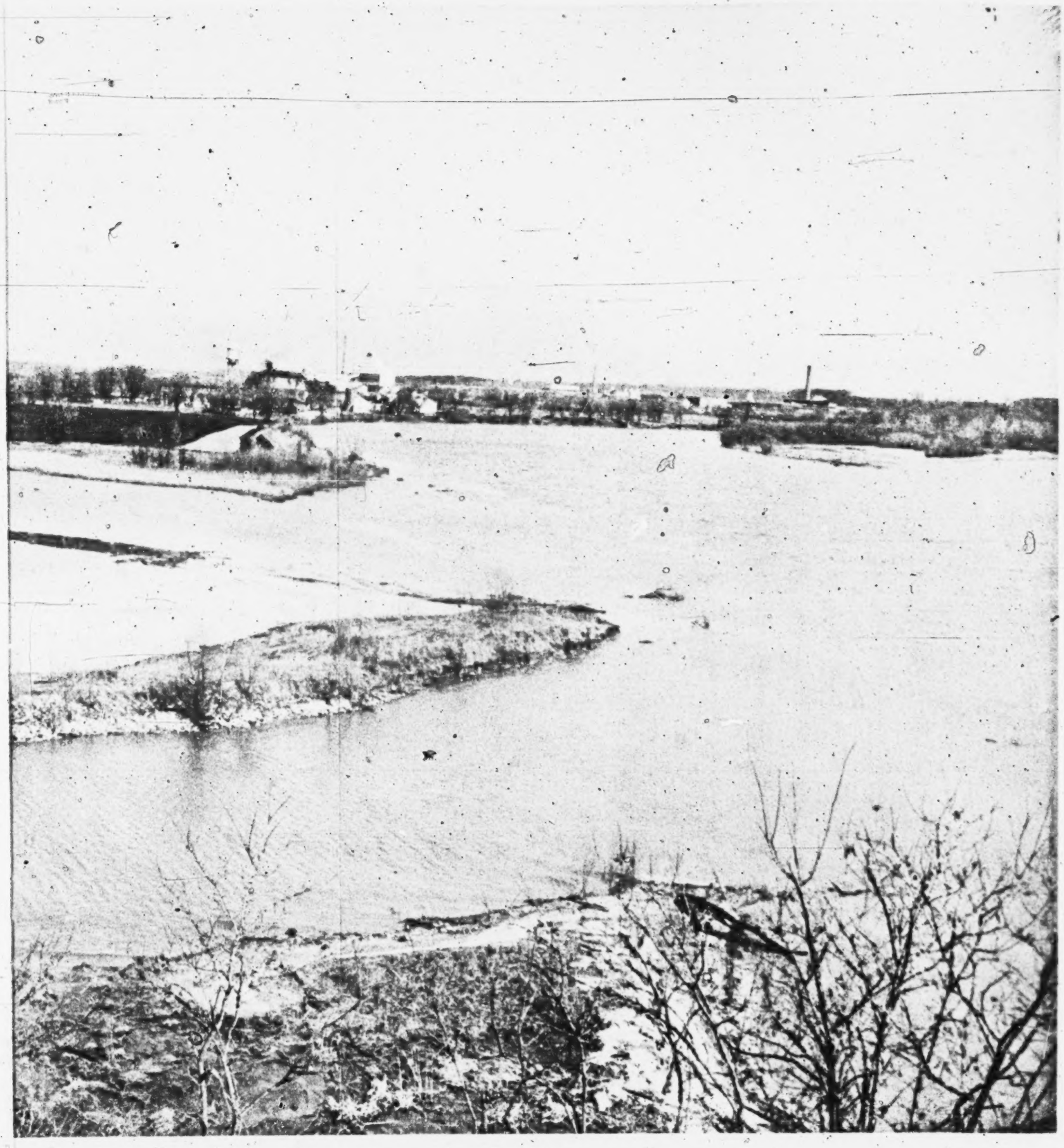
CERTIFICATE.

I hereby certify that the above and foregoing is a true, full and accurate transcript of the original shorthand notes had upon the hearing of the above-entitled cause.

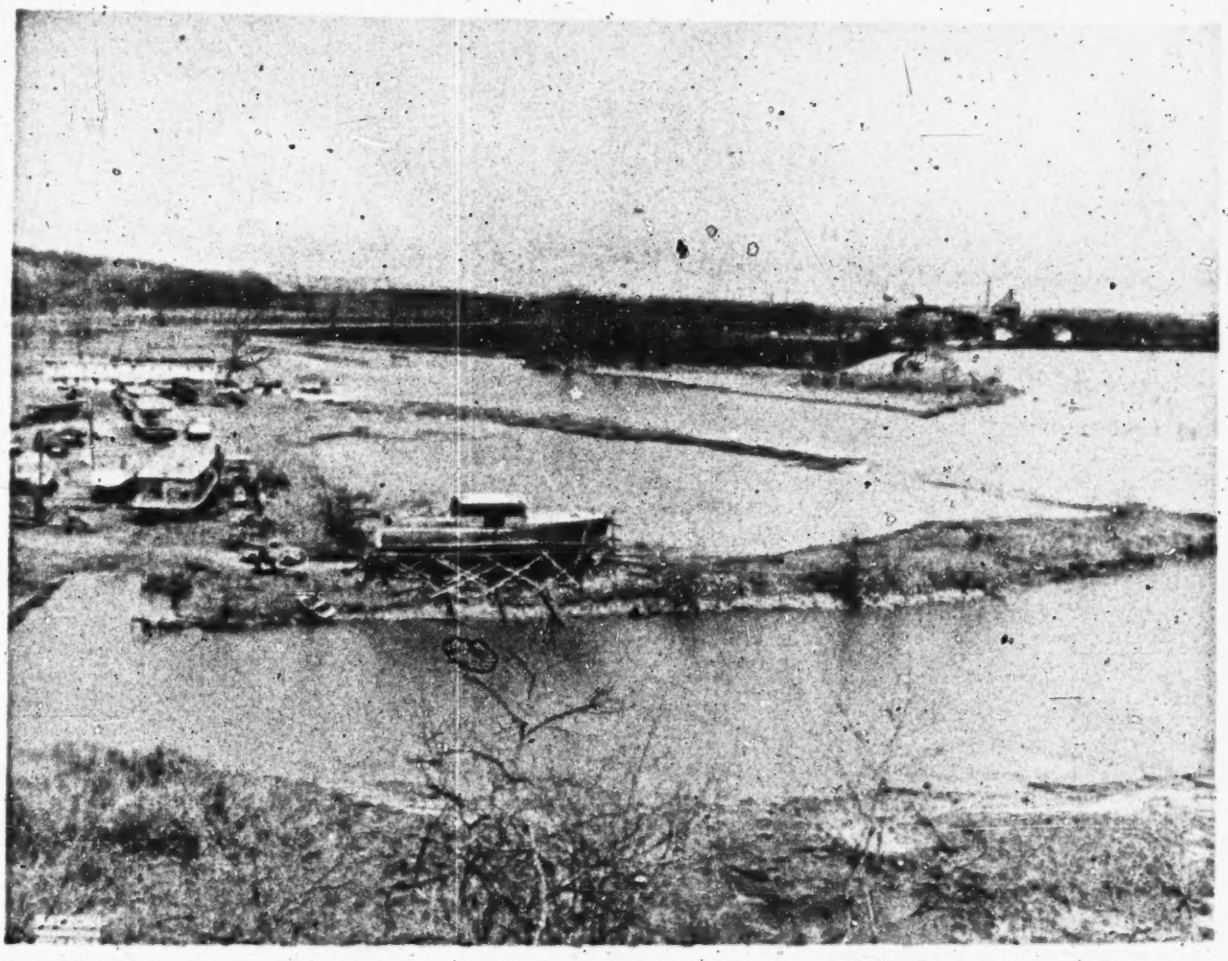
Thomas M. Ryan
Official Court Reporter,
U. S. District Court,
Northern District of Illinois.

April 26, 1950.

BAZZONI
PHOTOGRAPHER
OTTAWA

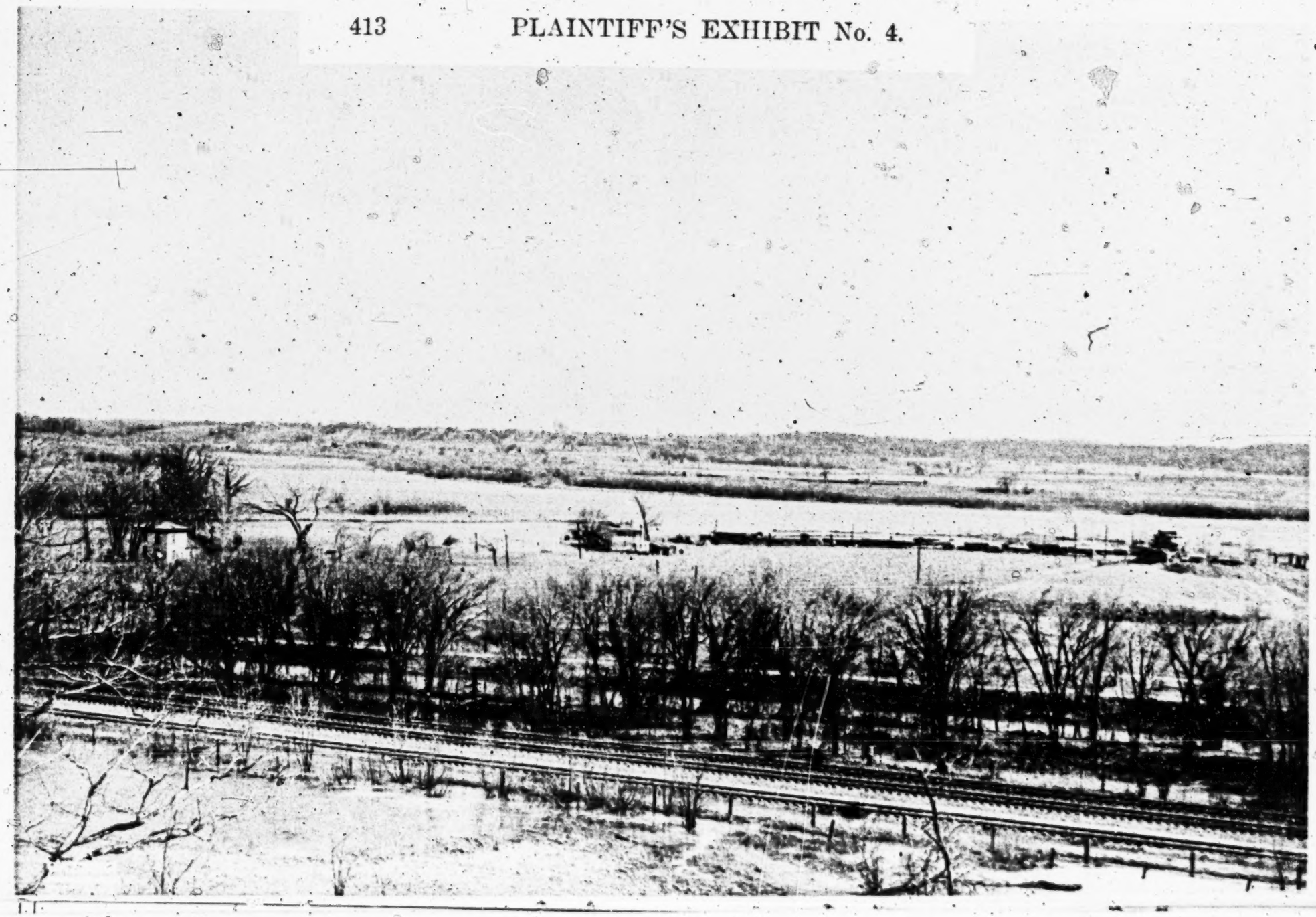


413 PLAINTIFF'S EXHIBIT No. 2 AND 3.



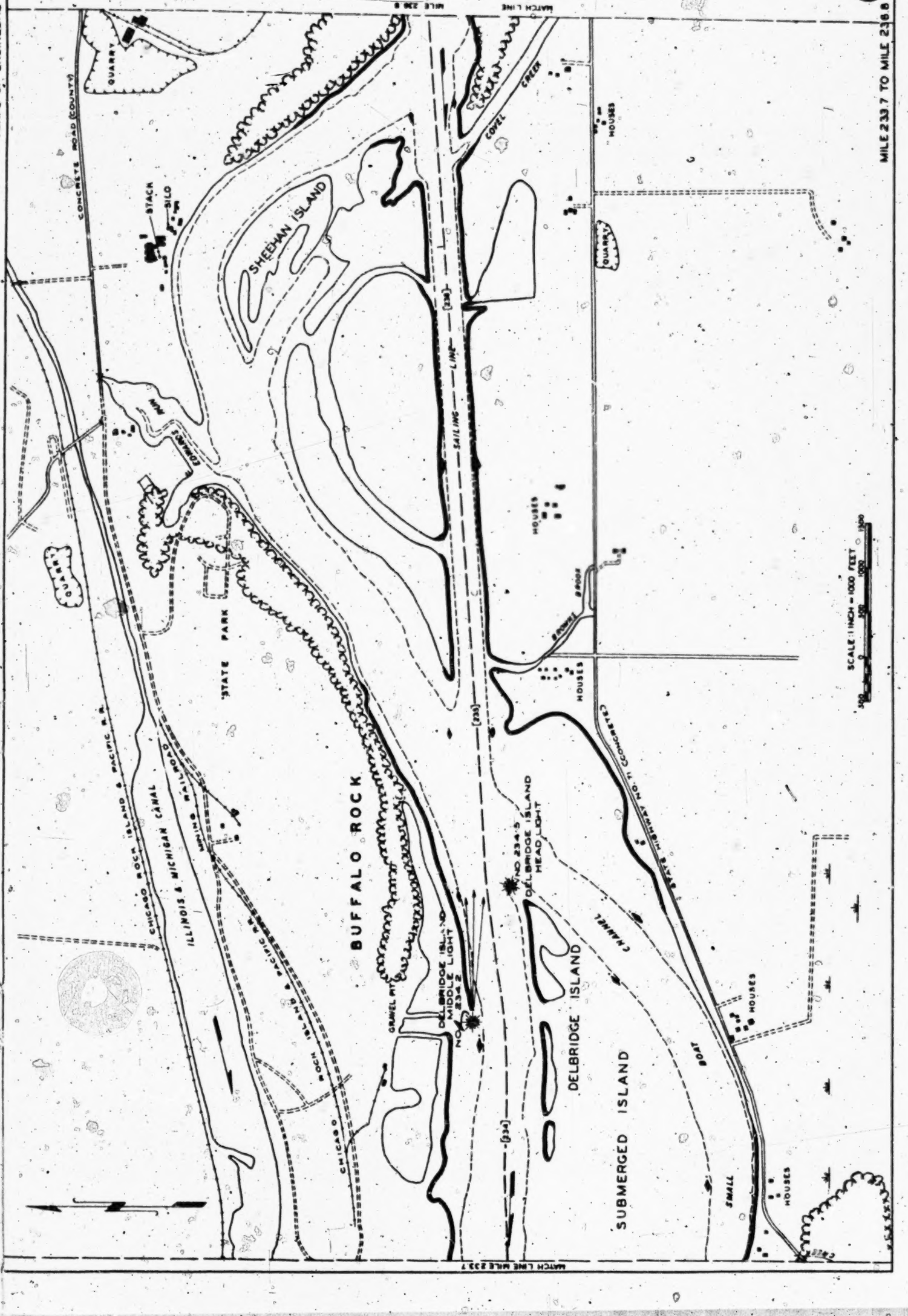
PLAINTIFF'S EXHIBIT No. 4.

Plaintiff's Exhibit No. 4



PLAINTIFF'S EXHIBIT No. 5.

(52)



C Form 881

File No. L 102-1

SERIAL NUMBER
50319

ISSUE NUMBER
-1-

UNITED STATES DEPARTMENT OF COMMERCE

BUREAU OF MARINE INSPECTION AND NAVIGATION

UNITED STATES COAST GUARD

LICENSE

TO OPERATE OR NAVIGATE MOTOR BOATS CARRYING PASSENGERS FOR HIRE

This is to certify that THOMAS J. DESPER *has given satisfactory evidence to the undersigned United States Local Inspectors, Bureau of Marine Inspection and Navigation, for the District of* CHICAGO, ILLINOIS, *that he can safely be intrusted with the duties and responsibilities of operator of motor boats as defined in the Act of April 25, 1940, when carrying passengers for hire, on the navigable waters of the United States, and is hereby licensed to act as such operator for the term of five years from this date.*

Given under our hands this 17th *day of* JUNE, 19 47

G. L. Lemay

Officer in Charge, Marine Inspection

C Form 1497

224

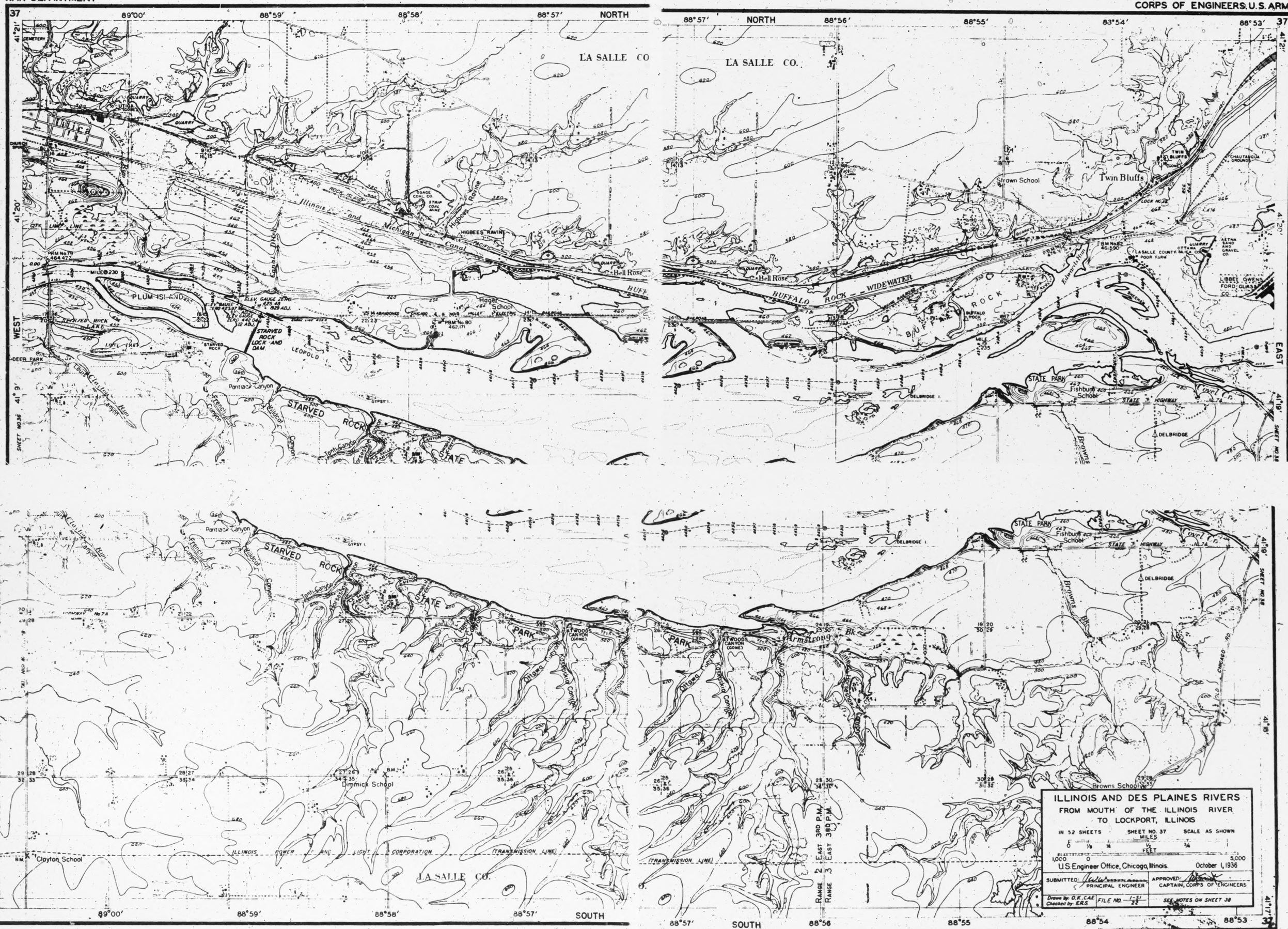
413

PLAINTIFF'S EXHIBIT No. 12.

Plaintiff's Exhibit No. 12

WAR DEPARTMENT

CORPS OF ENGINEERS, U.S. ARMY



ILLINOIS AND DES PLAINES RIVERS

FROM MOUTH OF THE ILLINOIS RIVER TO LOCKPORT, ILLINOIS

IN 52 SHEETS — SHEET NO. 37 — SCALE AS SHOWN

MILES 0 1/8 1/4 1/2 3/4

FEET 1,000 0 5,000

U.S. Engineer Office, Chicago, Illinois. October 1, 1936

SUBMITTED: PRINCIPAL ENGINEER — APPROVED: CAPTAIN, CORPS OF ENGINEERS

Drawn by O.K. C.A.E. Checked by E.R.S. FILE NO. 1-51/23

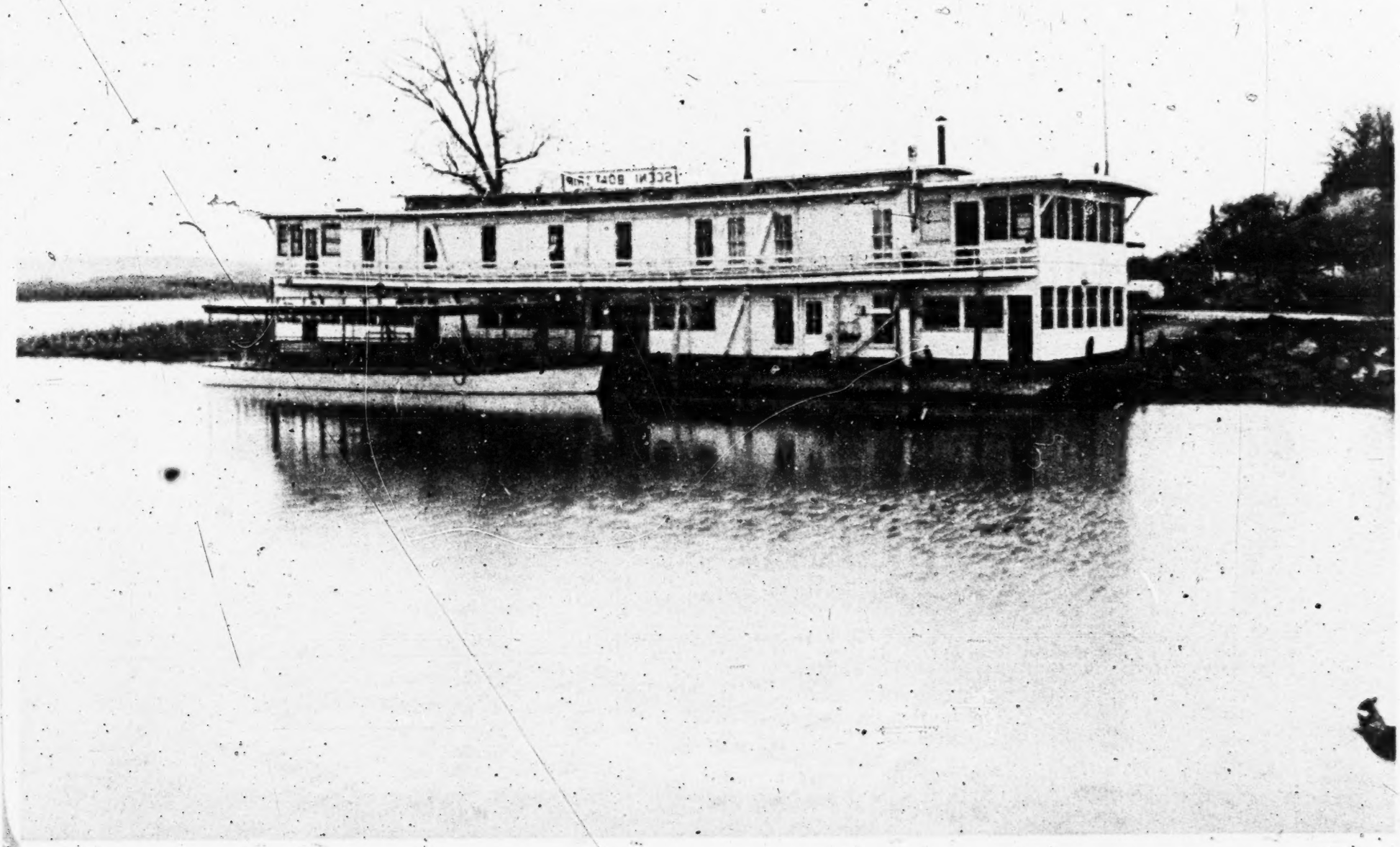
SEE NOTES ON SHEET 38

412 DEFENDANT'S EXHIBIT No. 1.

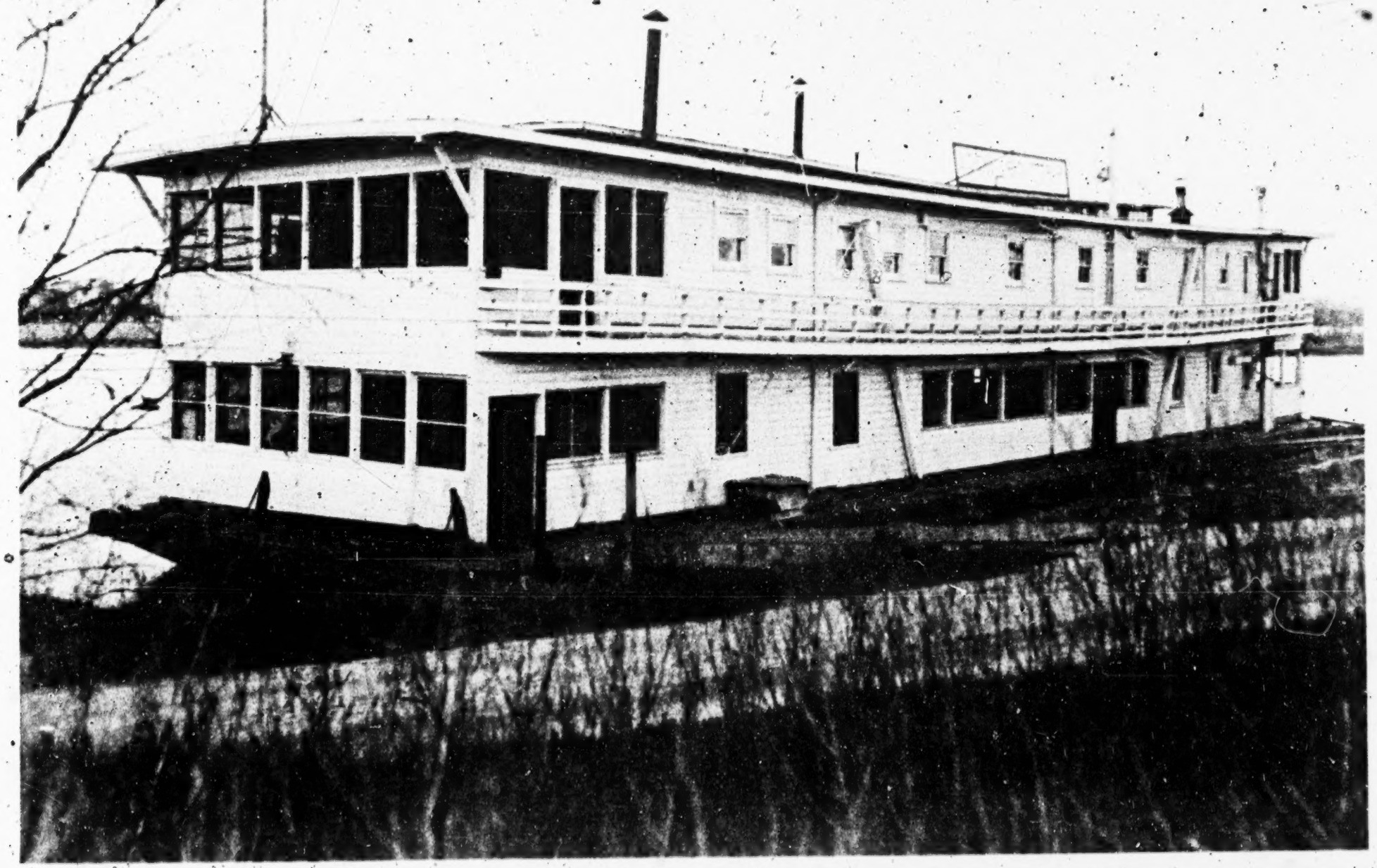
THOMAS DESPER

DATE	WAGES EARNED	PAID
Apr. 2, 1947	$ 96.80	$ 83.23
May 1, 1947	113.30	96.77
May 15, 1947	114.00	97.86
June 1, 1947	136.40	115.74
June 16, 1947	133.10	113.27
July 1, 1947	143.00	120.77
July 16, 1947	149.00	125.21
Aug. 1, 1947	134.20	118.16
Aug. 16, 1947	129.80	110.00
Sept. 1, 1947	143.00	125.30
Sept. 16, 1947	122.10	103.88
Oct. 1, 1947	107.80	96.52
Oct. 15, 1947	113.30	96.37
~~Oct. 27, 1947~~	~~____~~	~~47.30~~
Nov. 3, 1947	140.25	118.85
Nov. 17, 1947	112.20	95.68
Dec. 15, 1947	26.00	25.44
Apr. 1, 1948	112.80	96.17
April 16, 1948	111.25	95.24
May 17, 1948	86.25	72.39

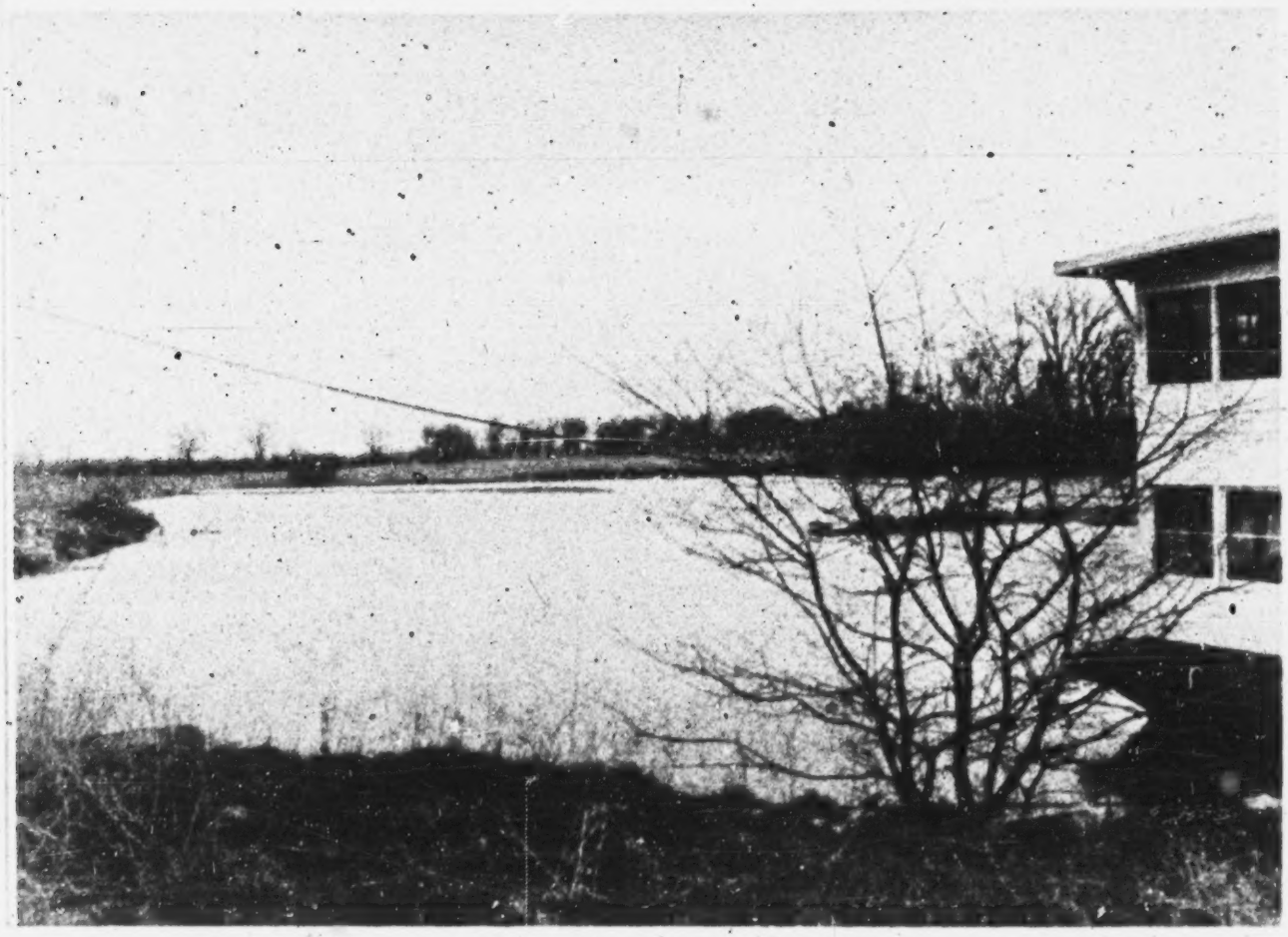
70,46



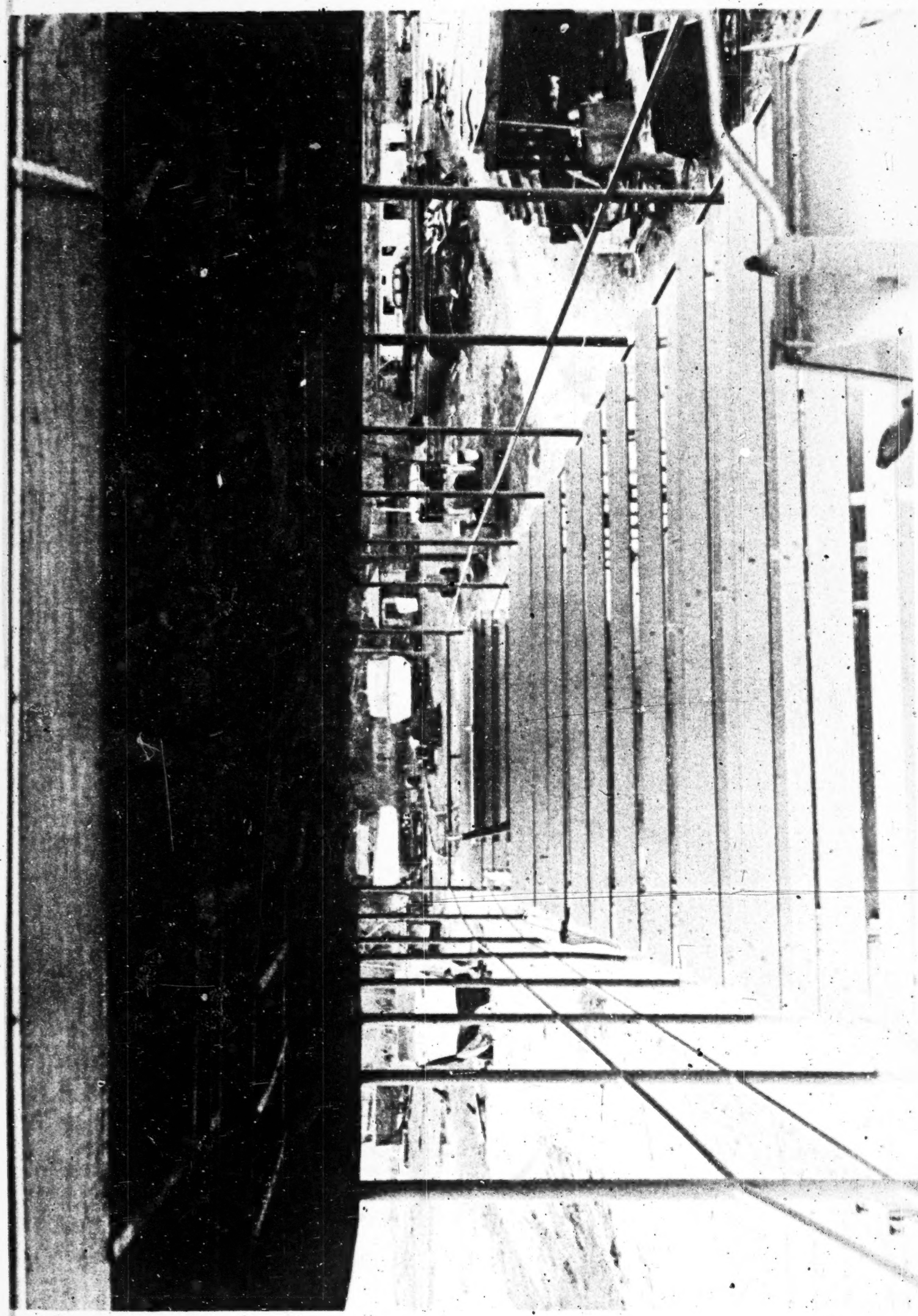
228 *Defendant's Exhibit No. 3*



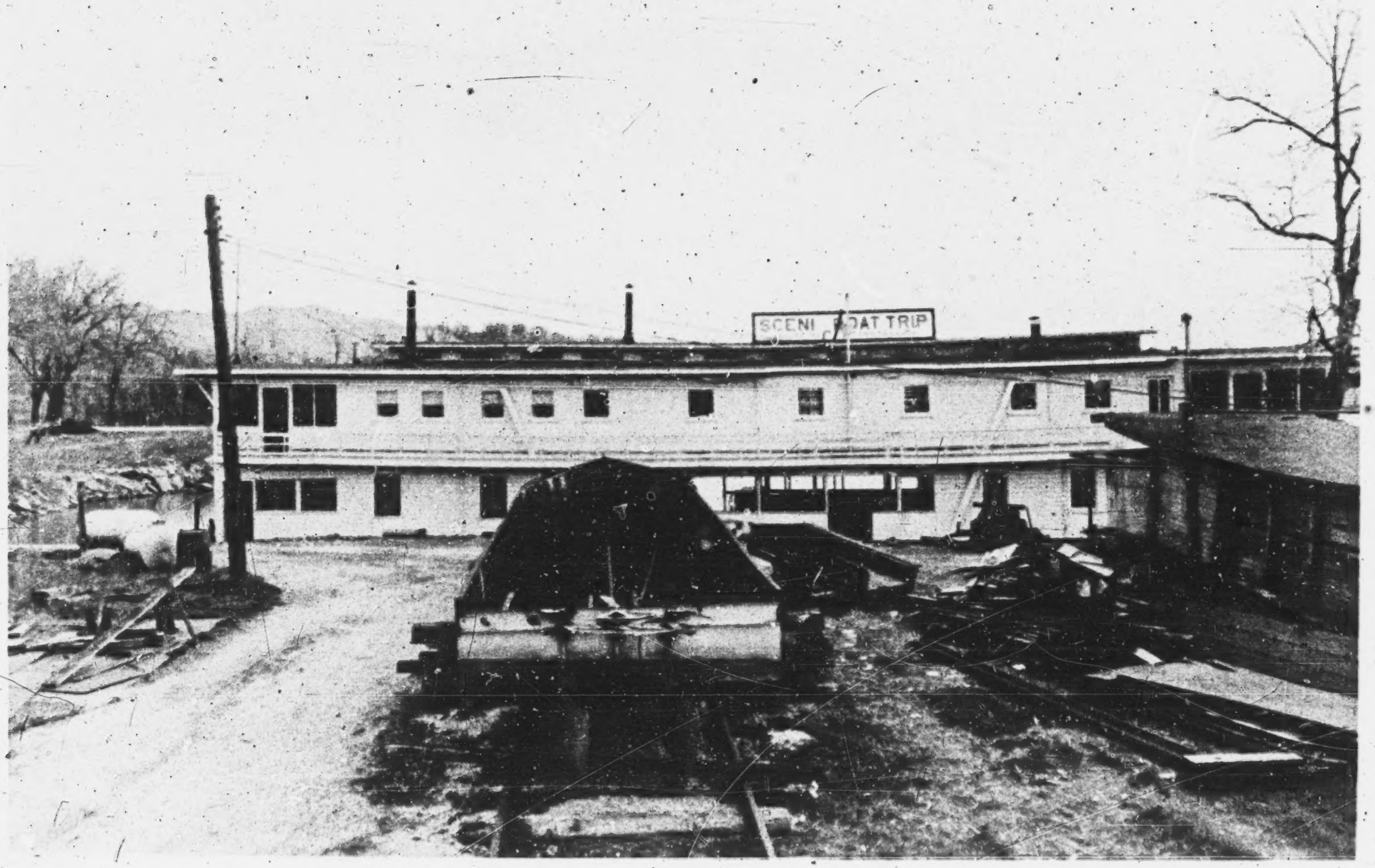
Defendant's Exhibit No. 4



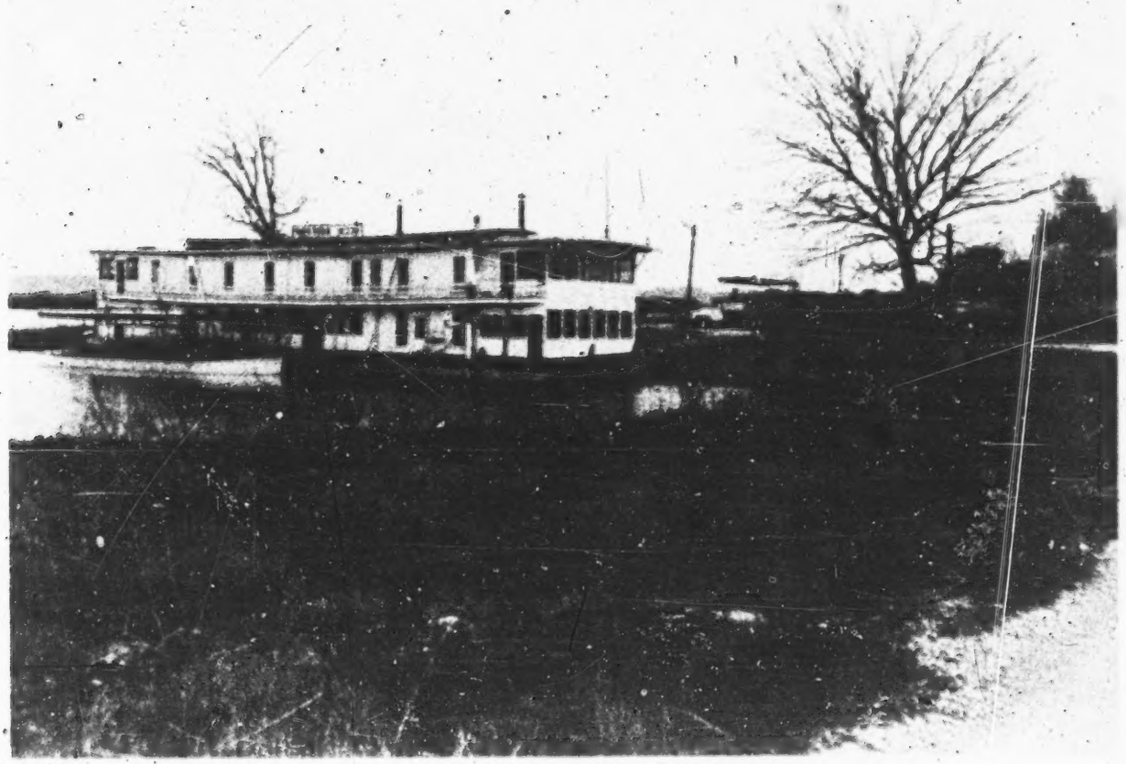
412 DEFENDANT'S EXHIBIT No. 7 AND 8.



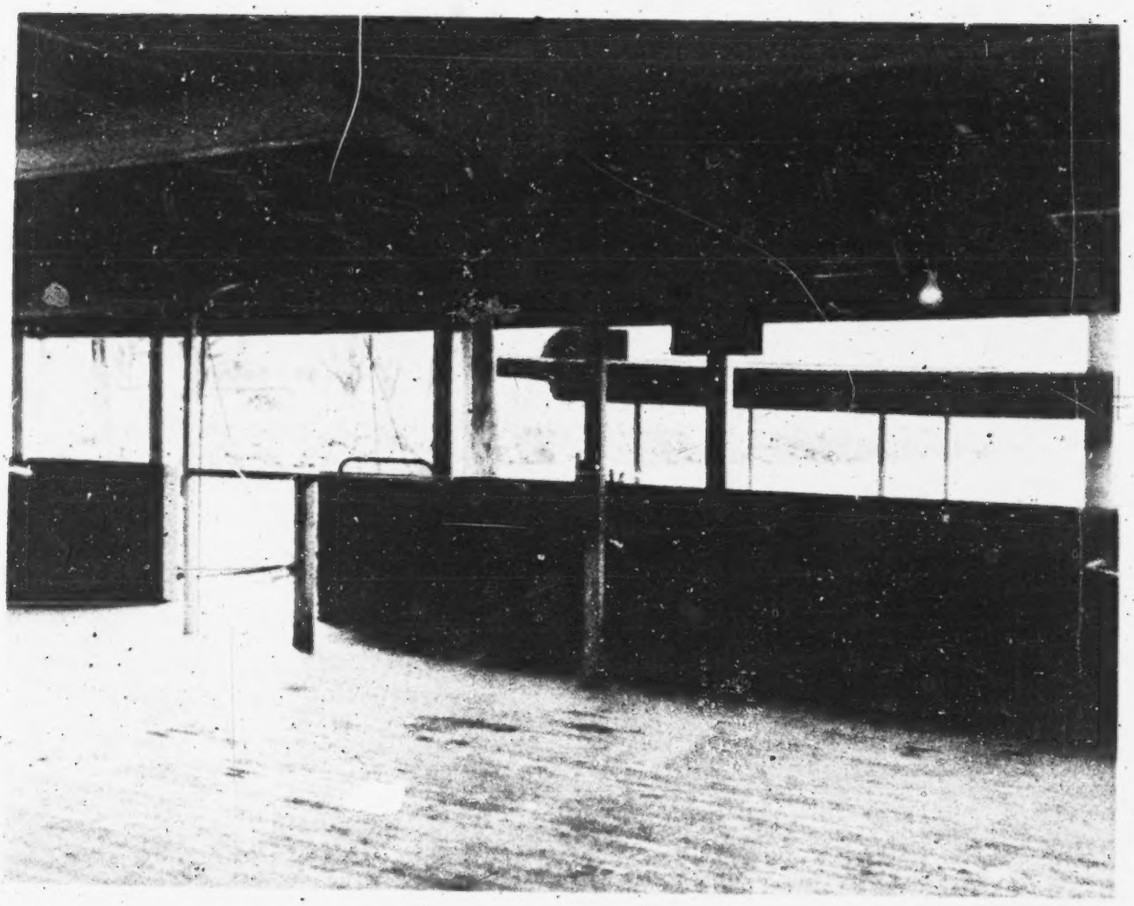
412 DEFENDANT'S EXHIBIT No. 10.

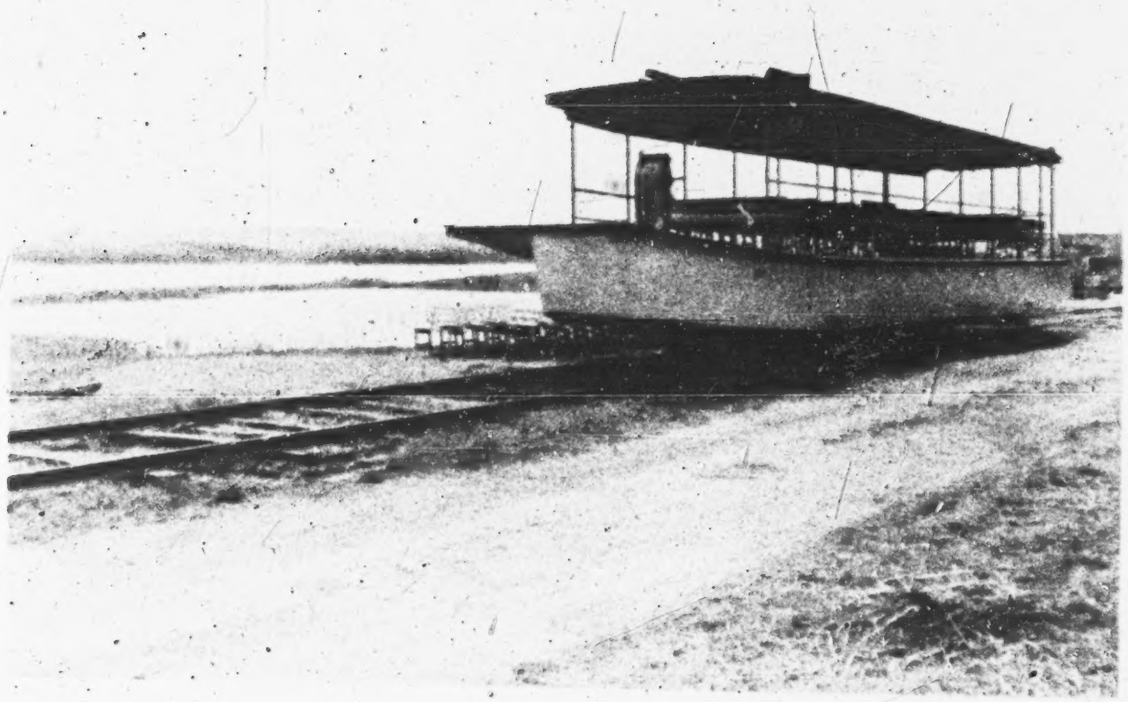

SCENI BOAT TRIP

412 DEFENDANT'S EXHIBIT No. 12 AND 13.



412 DEFENDANT'S EXHIBIT No. 14 AND 15.





412 DEFENDANT'S EXHIBIT 16.

CERTIFICATE OF INSURANCE

To The Industrial Commission of Illinois,
205 W. Wacker Drive, Chicago, Illinois.

GENTLEMEN:

This certifies that a Workmen's Compensation insurance policy, written upon the policy form heretofore filed with the Industrial Commission by the undersigned insurer, has been issued and delivered to the employer named below; that by the filing of this certificate of insurance it is admitted that the business, enterprise or operations of the employer is being operated under the Workmen's Compensation Act of the State of Illinois, and that said policy covers the entire liability of said employer to pay compensation under the provisions of said Act during said period; that jurisdiction of the employer by the Industrial Commission shall, for the purposes of the Workmen's Compensation Act, be jurisdiction of this insurer; that this insurer shall in all things be bound by and subject to the orders, findings, awards and decisions rendered against said employer, when the same shall have become final; that any provision in said policy, or in any endorsement attached thereto, attempting to limit or modify in any way the liability of this insurance carrier under said policy, shall be wholly void; and that said policy shall remain in full force and effect until ten days after receipt by the Industrial Commission of notice of its cancellation and shall cover all compensation liability occurring during said time.

This certificate of insurance is filed with the Industrial Commission by this insurer for itself and as agent of the said employer, in compliance with the provisions of Section 26 of the Workmen's Compensation Act and the rules of the Industrial Commission.

Name of employer insured. Starved Rock Ferry Company

Individual, Corporation, Partnership, Association, Receiver, Etc. Corporation

Address Ottawa LaSalle, Illinois

Location Ottawa, Ill. River and Horshoe Canyon, Ill. elsewhere in Ill.

Character of operations of the insured Steamers

Name of Insurer The Aetna Casualty & Surety Company

Address Hartford, Conn.

Policy number 8C 28402 repl. 8 C 25386

Effective Date 7-1-47

Dated this 3rd day of July A. D. 1947

The Aetna Casualty & Surety Company
Insurer

By Donald K. Weiser, Mgr.
Address 120 S. LaSalle St., Chicago, Ill.

REC'D
7-9-47
IND Comm

State of Illinois,
County of Cook—ss.

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF ILLINOIS

I, Luke F. Cunniff do hereby certify that I am the Secretary of the Industrial Commission of the State of Illinois; that as such Secretary, I am the custodian and keeper of the seal and all the files, records, documents and papers thereof;

And I Do Further Certify that the foregoing is a full, true, correct and complete copy of Certificate Of Insurance filed July 9, 1947, by the Aetna Casualty & Surety Company, evidencing compliance with Section 26 of the Workmen's Compensation Act of Illinois by Starved Rock Ferry Company, A Corp., effective July 1, 1947.

In Witness Whereof, I have hereunto subscribed my name and affixed the seal of the Industrial Commission of the State of Illinois, this 14th day of March, A.D. 1950.

(Seal)

Luke F. Cunniff
Secretary of the Industrial Commission
of the State of Illinois

412 DEFENDANT'S EXHIBIT 17.

State of Illinois
Dwight H. Green, Governor
INDUSTRIAL COMMISSION
205 W. Wacker Drive, Chicago, Ill.

APPLICATION FOR ADJUSTMENT OF CLAIM

Notice of Disputed Claim and Memorandum of Names and Addresses

(This form to be filed in triplicate)

Anna M. Desper, mother of Thomas J. Desper, Deceased; and Catherine J. Desper, a minor dependent sister of Thomas J. Desper, Deceased, by Anna M. Desper, her mother and next friend,
Petitioners,) No. 420756

vs.

Starved Rock Ferry Company, a corporation; and The Aetna Casualty and Surety Company,
Respondents.

The petition of the undersigned respectfully shows to this Honorable Commission the following, to-wit:

1. That on the 26th day of April, 1948, Thomas J. Desper received an injury by reason of an accident arising out of and in the course of his employment by the above named Starved Rock Ferry Company, which injury resulted in the death of said employee on, to-wit, the 26th day of April, 1948; that your petitioner is the mother and the sister of said deceased.

2. That a dispute has arisen with respect to the compensation to be paid for the disability resulting from such injury, and the general nature of the dispute is:

(b) A dispute concerning the amount and duration of the compensation payable, and whether any compensation is payable under the Workmen's Compensation Act.

3. The following particulars relative to this application are herewith given:

(a) Name of injured employee Thomas J. Desper
Address R.F.D. #1, La Salle, Illinois
Age at time of injury 21 years.

(b) Name of employer Starved Rock Ferry Company Place of business and address P. O. Box 95, Starved Rock State Park, La Salle, Illinois.

(c) Place of accident Buffalo Rock State Park boat landing near Ottawa, Illinois.

(d) Nature of work upon which injured was engaged at time of accident and how caused.
Was working on fire extinguisher which exploded and killed him instantly.

(e) State whether medical, surgical and hospital treatment were furnished by employer None; death instantaneous.
and, if so, to what extent; amount expended for above purposes and period treated.

(f) Earnings of employee during year preceding injury, if employed by the same employer, if not so employed, give earnings of such employees in the same class or grade. $1,920.00

(g) Compensation payments received from employer:
$ N account medical care and attendance.
$ O per week for ..... weeks' temporary total disability.
$ N per week for ..... weeks' partial disability.
$ E account of other items, here enumerated:

.....

5. (a) Date of service on employer of notice of accident April 26, 1948

(b) If notice not served within thirty days, did any agent of employer have knowledge of the facts and circumstances of the accident? .....

(Fill out only one of the following tables, indicating which paragraph of Section 7 compensation is claimed under).

6. The deceased left him surviving:

A widow:

Name - - - Address

Children (give names, addresses and ages):

Name - - - Address Age

whom he was under legal obligation to support.

(b) Parent or parents totally dependent upon the earnings of deceased at time of injury:
Name Anna M. Desper
Address R.F.D. #1, La Salle, Illinois
Thomas Desper (died Feb. 1, 1949)
Address R.F.D. #1, La Salle, Illinois

(c) Parent, grandparent or grandchild partially dependent upon the earnings of the deceased at the time of the injury and the respective dependencies:
Name..... Address..... Dependency.....

(d) Collateral heirs dependent upon the deceased at the time of the injury and the average annual contributions during the two years preceding the injury resulting in death:
Name Catherine J. Desper
Address R.F.D. #1, LaSalle, Illinois
Contribution to be determined

(e) If no widow or heirs survive give amount of funeral expenses:

.....

7. Your petitioner prays that the Industrial Commission appoint an arbitrator to make such inquiries and investigations as he shall deem necessary, and that a day be appointed by said Industrial Commission and the time and place thereof fixed, where said arbitrator may hear such proper evidence as the parties hereto may submit, and that an award and decision may be made, in conformity with the statute in such case made and previded.

The undersigned requests that all notices of proceedings in the above entitled matter be served personally or by registered mail upon the party whose name and address follows as attorney for petitioner; if no attorney's name appears, then to the name and address of the undersigned.

Dated this 26th day of March, 1949

(Signed) Anna M. Desper
Catherine J. Desper
By Anna M. Desper
Her mother &
next friend

Joseph D. Ryan
Malone & Herbolsheimer
Attorneys for Petitioners.
Address Joseph D. Ryan, Suite 2007, 100 N. La Salle St., Chicago 2, Ill.
Telephone Franklin 5124

Malone and Herbolsheimer, State Bank Building, La Salle, Ill.
Telephone—La Salle 111

State of Illinois
Adlai E. Stevenson, Governor
INDUSTRIAL COMMISSION
160 N. LaSalle Street
Chicago 1, Ill.

NOTICE OF DECISION OF ARBITRATOR

Anna M. Desper, mother of Thomas J. Desper, deceased, and Catherine J. Desper, a minor dependent sister of Thomas J. Desper, deceased, by Anna M. Desper, her mother and next friend

Petitioners

vs.

Starved Rock Ferry Company, a corporation; and The Aetna Casualty and Surety Company

Respondents

Starved Rock Ferry Company

Petitioner

vs.

Thomas Desper, Sr., father, Anna M. Desper, mother, James Desper, brother, and Kathryn Desper, sister of Thomas Desper, deceased

Respondents

Take Notice, that on the 9th day of December, 1949, there was filed with the Industrial Commission, at Chicago, Illinois, the decision of the Arbitrator in the above entitled matter, a copy of which decision is enclosed to you herewith; and

You Are Further Notified that unless a petition for review is filed by you with the Industrial Commission within fifteen (15) days after receipt by you of this notice and copy of such decision, and an agreed statement of the facts appearing upon the hearing before the Arbitrator or a correct stenographic report of the proceedings at such hearing within twenty (20) days, then and in that event the decision of the said Arbitrator shall be entered of record by this Commission as the decision of the Industrial Commission.

Dated at Chicago, Illinois, this 9th day of December, 1949.

Industrial Commission of Illinois
By M. W. Grigsby
Assistant Secretary.

(Seal)
EC

State of Illinois
Adlai E. Stevenson, Governor
INDUSTRIAL COMMISSION
160 N. LaSalle Street
Chicago 1, Ill.

NOTICE OF DECISION OF ARBITRATOR

.....	)	
Petitioner,	)	
vs.	)	No. 420756
.....	)	
Respondent.	)	

To Petitioner, through Angerstein & Angerstein, 135 S. LaSalle St., Chicago, Ill.
To Respondent, through Malone & Herbolsheimer, State Bank Bldg., LaSalle, Ill.
Joseph D. Ryan, 100 N. LaSalle St., Chicago, Ill. Room 1007.
Cha. J. Kovacs, 120 S. LaSalle St., Chicago, Ill.
Ivan A. Elliott, Atty. Gen'l., 208 Springfield, Ill.

Take Notice, that on the 9th day of December, 1949, there was filed with the Industrial Commission, at Chicago, Illinois, the decision of the Arbitrator in the above entitled matter, a copy of which decision is enclosed to you herewith; and

You Are Further Notified that unless a petition for review is filed by you with the Industrial Commission within fifteen (15) days after receipt by you of this notice and copy of such decision, and an agreed statement of the facts appearing upon the hearing before the Arbitrator or a correct stenographic report of the proceedings at such hearing within twenty (20) days, then and in that event the decision of the said Arbitrator shall be entered of record by this Commission as the decision of the Industrial Commission.

Dated at Chicago, Illinois, this 9th day of December, 1949.

Industrial Commission of Illinois
By M. W. Grigsby
Assistant Secretary.

(Seal)
EC

State of Illinois

State of Illinois,)
County of LaSalle) ss.

Before the Industrial Commission of Illinois

Anna M. Desper, mother of Thomas J. Desper, deceased, and Catherine J. Desper, a minor dependent sister of Thomas J. Desper, deceased, by Anna M. Desper, her mother and next friend

Petitioners

vs.

Starved Rock Ferry Company, a corporation; and The Aetna Casualty and Surety Company

Respondents

Starved Rock Ferry Company

Petitioner

vs.

Thomas Desper, Sr., father, Anna M. Desper, mother, James Desper, brother, and Kathryn Desper, sister of Thomas Joseph Desper, deceased

Respondents

account thereof was made on said Starved Rock Ferry Co. within the time required under the provisions of said Act.

That the earnings of the decedent during the year next preceding the injury were $1920.00, and that the average weekly wage was $36.92.

That decedent at time of injury was 21 years of age and had no children under 16 years of age.

That necessary first aid, medical, surgical and hospital services have been provided by the respondent herein.

That Anna Desper, mother of Thomas Joseph Desper, deceased, is entitled to have and receive from said Starved Rock Ferry Co., the sum of $19.50 per week for a period of 266 weeks, and one week at $13.00, as provided in paragraph (b) of Section 7 of said Act, as amended, for the reason that the injuries sustained caused the death of Thomas Joseph Desper, on the 26th day of April, 1948, leaving him surviving Anna Desper, his mother, who was totally dependent upon the earnings of said decedent for her support. That this award and each of the installments thereof shall be paid to the mother of said decedent for her sole use and benefit, until the further order of the Industrial Commission, as provided in Section 21 of said Act, as amended.

The Arbitrator further finds that decedent also left him surviving at the time of his death, Thomas Desper, Sr., his father, who departed this life on, to wit, the 1st day of February, 1949, and a minor dependent sister, Catherine J. Desper.

That no compensation has been paid on account of said injury and resultant death.

That said Anna Desper, mother of Thomas Joseph Desper, deceased, is now entitled to have and receive from Starved Rock Ferry Co. the sum of, $1638.00, being the amount of compensation that has accrued from the 26th day of April, 1948, to the 6th day of December, 1949, the remainder of said award to be paid to said mother by said Starved Rock Ferry Co. in weekly payments, commencing one week from the date last above mentioned.

Dated and Entered this 9th day of December, 1949.

Tom M. Garman,
Arbitrator.

EC

State of Illinois
State of Illinois)
County of LaSalle) ss.

Before the Industrial Commission of Illinois

.....Petitioner,)
vs.) No. 420756
.....Respondent.)

DECISION OF ARBITRATOR

Notice and applications for adjustment of claim having been filed in the above entitled matter, and Tom M. Garman having been designated by said Commission as Arbitrator thereof, and said matter having come on to be heard before said Arbitrator at City Hall in the City of LaSalle, said County and State, on the 28th day of July, 1949; and, after hearing the proofs and allegations of the parties hereto, and having made careful inquiry and investigation of said matter and being fully advised in the premises, said Arbitrator finds:

That the deceased Thomas Joseph Desper and the Starved Rock Ferry Co. were on the 26th day of April, 1948, operating under the provisions of the Illinois Workmen's Compensation Act; that on the date last above mentioned said decedent sustained accidental injuries which did arise out of and in the course of the employment; and that

notice of said accident was given said Starved Rock Ferry Co. and claim for compensation on account thereof was made on said Starved Rock Ferry Co. within the time required under the provisions of said Act.

That the earnings of the decedent during the year next preceding the injury were $1920.00, and that the average weekly wage was $36.92.

That decedent at time of injury was 21 years of age and had no children under 16 years of age.

That necessary first aid, medical, surgical and hospital services have been provided by the respondent herein.

That Anna Desper, mother of Thomas Joseph Desper, deceased, is entitled to have and receive from said Starved Rock Ferry Co., the sum of $19.50 per week for a period of 266 weeks, and one week at $13.00, as provided in paragraph (b) of Section 7 of said Act, as amended, for the reason that the injuries sustained caused the death of Thomas Joseph Desper, on the 26th day of April, 1948, leaving him surviving Anna Desper, his mother, who was totally dependent upon the earnings of said decedent for her support. That this award and each of the installments thereof shall be paid to the mother of said decedent for her sole use and benefit, until the further order of the Industrial Commission, as provided in Section 21 of said Act, as amended.

The Arbitrator further finds that decedent also left him surviving at the time of his death, Thomas Desper, Sr., his father, who departed this life on, to wit, the 1st day of February, 1949, and a minor dependent sister, Catherine J. Desper.

That no compensation has been paid on account of said injury and resultant death.

That said Anna Desper, mother of Thomas Joseph Desper, deceased, is now entitled to have and receive from Starved Rock Ferry Co. the sum of $1638.00, being the amount of compensation that has accrued from the 26th day of April, 1948, to the 6th day of December, 1949, the remainder of said award to be paid to said mother by said Starved Rock Ferry Co. in weekly payments, commencing one week from the date last above mentioned.

Dated and Entered this 9th day of December, 1949.

Tom M. Garman,
Arbitrator.

EC

State of Illinois)
County of Cook) ss.

Before the Industrial Commission of Illinois

Anna M. Desper, mother of Thomas J. Desper, Deceased; and Catherine J. Desper, a minor dependent sister of Thomas J. Desper, Deceased, by Anna M. Desper, her mother and next friend, Petitioner,

vs.

Starved Rock Ferry Company, a corporation; and The Aetna Casualty and Surety Company, Respondents. No. 420756

Starved Rock Ferry Company, Petitioner,

vs.

Thomas Desper, Sr., father, Anna M. Desper, mother, James Desper, brother, and Kathryn Desper, sister of Thomas Joseph Desper, deceased, Respondents.

I, Luke F. Cunniff, do hereby certify that I am the Secretary of the Industrial Commission of the State of Illinois; that as such Secretary, I am the custodian and keeper of the seal and all the files, records, documents and papers thereof;

And I Do Further Certify that the foregoing are full, true, correct and complete copies of Application for Adjustment of Claim filed March 28, 1949, and Notice of Decision of Arbitrator and Decision of Arbitrator entered under date of December 9, A. D. 1949, in the above entitled matter before the Industrial Commission of Illinois.

In Witness Whereof, I have hereunto subscribed my name and affixed the seal of the Industrial Commission of the State of Illinois, this 6th day of March, A. D. 1950.

Luke F. Cunniff
Secretary of the Industrial Commission of the State of Illinois.

(Seal)

412 DEFENDANT'S EXHIBIT 18.

To Starved Rock Ferry Company:

The undersigned, Thomas Desper, Anna M. Desper, and Catherine Desper, being the father, mother, and sister, respectively, of Thomas J. Desper, Deceased, hereby demand the payment of compensation for the death of the said Thomas J. Desper as the result of an accident arising out of and in the course of his employment by you, said Starved Rock Ferry Company, on April 26, 1948, at the Buffalo Rock State Park boat landing near the City of Ottawa, in the County of La Salle and State of Illinois.

This demand is made to comply with Section 24 of the Workmen's Compensation Act of the State of Illinois, being Paragraph 161 of Chapter 48 of the Illinois Revised Statutes of 1947.

Dated at La Salle, Illinois, this 14th day of October, A.D. 1948.

Anna M. Desper
Anna M. Desper
Catherine Desper
Catherine Desper
Thomas Desper
Thomas Desper

State of Illinois,
County of Cook—ss.

BEFORE THE INDUSTRIAL COMMISSION OF ILLINOIS

Estate of Thomas J. Desper, Petitioner,	)	
vs.	)	No. 420756
Starved Rock Ferry Company, a corp., and the Aetna Casualty & Surety Company, Respondents,	)	

I, Luke F. Cunniff, do hereby certify that I am the Secretary of the Industrial Commission of the State of Illinois; that as such Secretary, I am the custodian and keeper of the seal and all the files, records, documents, and papers thereof;

And, I Do Further Certify that the foregoing is a full,

true and correct copy of Plaintiff's Exhibit 8, on file with the Industrial Commission of the State of Illinois in the above entitled matter lately pending before said Commission.

In Witness Whereof, I have hereunto subscribed my name and affixed the seal of the Industrial Commission of the State of Illinois, this 21st day of April, A.D. 1950.

Luke E. Cunniff
Secretary of the Industrial Commission
(Seal) of the State of Illinois

414 And afterwards on, to wit, the 24th day of April, 1950 came the Defendant by its attorneys and filed in the Clerk's office of said Court its certain Two (2) Motions in words and figures following, to wit:

415 IN THE DISTRICT COURT OF THE UNITED STATES

* * (Caption—No. 49 C 481) * *

MOTION.

Comes Now the defendant by Angerstein & Angerstein and Charles T. Shanner, its attorneys, and moves at the close of the plaintiff's evidence, that the court instruct the jury to return a verdict finding the defendant not guilty.

Angerstein & Angerstein
Charles T. Shanner
Attorneys for Defendant

416 IN THE DISTRICT COURT OF THE UNITED STATES

* * (Caption—No. 49 C 481) * *

MOTION.

Comes now the defendant, by Angerstein & Angerstein and Charles T. Shanner its attorneys, at the close of all the evidence in the case, and moves the Court to instruct the jury to return a verdict finding the defendant not guilty.

Angerstein & Angerstein
Charles T. Shanner
Attorneys for Defendant

417 And afterwards on, to wit, the 26th day of April, 1950 there was filed in the Clerk's office of said Court a certain Verdict in words and figures following, to wit:

418 IN THE DISTRICT COURT OF THE UNITED STATES
* * (Caption—No. 49 C 481) * *

VERDICT.

We, the Jury, find the defendant guilty and assess the plaintiff's damages at the sum of Twenty-five thousand Dollars and no Cents ($25,000.00).

Foreman	Raymond M. Reimisch
	Winifred E. Jones
Mayfred L. Lewy	Ruth A. Williams
R. N. Washington	Clarence Reese, Jr.
Minnie F. Berndt	Etta W. Holz
Mildred L. Hayes	Alice Ellenberg
Ruth P. Ingram	Mrs. Johanna Podlesak

419 And on the same day, to wit, on the 26th day of April, 1950, being one of the days of the regular April term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Michael L. Igoe, District Judge, appears the following entry, to wit:

420 IN THE DISTRICT COURT OF THE UNITED STATES
* * (Caption—No. 49 C 481) * *

This day again come the parties to this suit by their attorneys, respectively, and the Jury heretofore empaneled and sworn herein for the trial of this cause also come and render their verdict in open Court and on their oath do say:

"We the Jury, find the defendant guilty and assess the plaintiff's damages at the sum of Twenty-Five Thousand Dollars and no Cents ($25,000.00)." and it is Ordered that the verdict be filed and the Jury discharged from further service herein and it is

Considered, Ordered and Adjudged by the Court that the plaintiff do have and recover of and from the defendant her damages herein in the amount of Twenty-Five Thousand Dollars ($25,000.00) in form as by the Jury assessed together with her costs and charges in this behalf expended and have execution therefor.

421 And afterwards on, to wit, the 5th day of May, 1950 came the Defendant by its attorneys and filed in the Clerk's office of said Court its certain Motion For Judgment Notwithstanding The Verdict Of The Jury in words and figures following, to wit:

422 IN THE DISTRICT COURT OF THE UNITED STATES
* * (Caption—No. 49 C 481) * *

MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT OF THE JURY.

Comes now the defendant, by Angerstein & Angerstein and Charles T. Shanner, its attorneys, and moves that the verdict and judgment be set aside and for judgment in accordance with its motion for a directed verdict heretofore made herein at the close of all of the evidence in the case, on the following grounds:

1. The evidence is legally insufficient to support the verdict for the plaintiff.
2. As a matter of law, the plaintiff proved no cause of action under the Merchant Marine Act of 1920 (The Jones Act).
3. The sole remedy for the death of plaintiff's intestate is under the terms and provisions of the Workmen's Compensation Act of the State of Illinois.

Angerstein & Angerstein
Charles T. Shanner
Attorneys for Defendant

423 And on the same day, to wit, the 5th day of May, 1950 came the Defendant by its attorneys and filed in the Clerk's office of said Court its certain Motion for A New Trial in words and figures following, to wit:

424 IN THE DISTRICT COURT OF THE UNITED STATES
* * (Caption—No. 49 C 481) * *

MOTION FOR A NEW TRIAL.

Comes now the defendant, by Angerstein & Angerstein and Charles T. Shanner, its attorneys, and, in the alternative to its motion for a judgment notwithstanding the verdict of the jury, moves the court to set aside the verdict of the jury and to grant the defendant a new trial for the following reasons:

1. The verdict is contrary to the law.
2. The verdict is contrary to the evidence.
3. The verdict is against the manifest weight of the evidence.

4. The damages awarded by the jury are excessive.
5. The damages awarded by the jury are so excessive as to show passion and prejudice.
6. The court erred in its instructions to the jury.
7. The court erred in instructing the jury in accordance with plaintiff's written request designated "A".
8. The court erred in instructing the jury in accordance with plaintiff's written request designated "B".
9. The court erred in instructing the jury in accordance with plaintiff's written request designated "L".
10. The court erred in refusing to instruct the jury in accordance with defendant's written request No. 5.
11. The court erred in its rulings on the admission of evidence.

425 12. The court erred in refusing to admit in evidence defendant's exhibit No. 16 for identification.

13. The court erred in refusing to admit in evidence defendant's exhibit No. 17 for identification.
14. The court erred in refusing to admit in evidence defendant's exhibit No. 18 for identification.
15. The court erred in admitting in evidence plaintiff's exhibit No. 11.
16. The court erred in permitting the plaintiff to examine George Claudnic as an adverse witness.
17. The court erred in permitting the plaintiff to examine Michael H. Arnold as an expert witness.
18. The court erred in denying defendant's motion for a stay of proceedings in this cause.
19. The court erred in denying defendant's motion to file an amended answer to the original complaint.

Angerstein & Angerstein
Charles T. Shanner
Attorneys for Defendant

426 And afterwards, to wit, on the 25th day of May, 1950, being one of the days of the regular May term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Michael L. Igoe, District Judge, appears the following entry, to wit:

427 IN THE DISTRICT COURT OF THE UNITED STATES

(Caption—No. 49 C 481)

ORDER.

On motion of the attorneys for plaintiff, the time within which plaintiff may reply to defendant's motion for a new

trial and motion for judgment notwithstanding the verdict is hereby extended to and including June 10, 1950, and the time within which the defendant may reply thereto is extended to and including June 15, 1950.

Enter:

Igoe
Judge

Dated this 25th day of May, A. D. 1950.

428 And afterwards, to wit, on the 28th day of June, 1950, being one of the days of the regular June term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Michael L. Igoe, District Judge, appears the following entry, to wit:

429 IN THE DISTRICT COURT OF THE UNITED STATES

* * (Caption—No. 49 C 481) * *

This cause having been heretofore taken under advisement on the motions of the defendant for judgment notwithstanding the verdict and for a new trial, after due consideration of the briefs of counsel, said motions and other papers filed herein and the Court being now fully advised in premises it is

Ordered that the motion of the defendant for judgment notwithstanding the verdict be and it is hereby overruled and that the motion of the defendant for a new trial be and it is hereby also overruled.

430 And afterwards on, to wit, the 27th day of July, 1950 came the Defendant by its attorneys and filed in the Clerk's office of said Court its certain Notice Of Appeal And Supersedeas Bond On Appeal in words and figures following, to wit:

431 IN THE DISTRICT COURT OF THE UNITED STATES

* * (Caption No.—49 C 481) * *

NOTICE OF APPEAL

Notice is hereby given that Starved Rock Ferry Company, a corporation, defendant above named, hereby appeals to the United States Court of Appeals for the Seventh Circuit from the final judgment entered against the defendant in this action on April 26, 1950 and from the order overruling defendant's motions for judgment notwithstand-

ing the verdict of the jury and for a new trial entered in this action on June 28, 1950.

Angerstein & Angerstein
Charles T. Shanner
Attorneys for
Defendant-Appellant

Address of attorneys:
Suite 762
135 South La Salle Street
Chicago 3, Illinois
Phone: STate 2-0588

(Certificate of Mailing attached hereto.)

432 United States of America,
Northern District of Illinois—ss.

CERTIFICATE OF MAILING

I, Roy H. Johnson, Clerk of the United States District Court in and for the Northern District of Illinois, do hereby certify that on July 27, 1950, in accordance with Rule 73 (b) of the Federal Rules of Civil Procedure a copy of the foregoing Notice of Appeal was mailed to

Joseph E. Ryan
Malone & Herbolsheimer
100 N. La Salle St.
Chicago, Illinois

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Chicago, Illinois, this 27th day of July, A. D., 1950.

Roy H. Johnson
Clerk

(Seal) by Grace C. Rowe
Deputy Clerk

433

KNOW ALL MEN BY THESE PRESENTS:

That we, Starved Rock Ferry Company, a corporation, as principal, and The Aetna Casualty and Surety Company, as sureties, are held and firmly bound unto Anna Desper, Administratrix of the Estate of Thomas J. Desper, Jr., Deceased, in the full and just sum of Thirty Thousand Dollars ($30,000.00) to be paid to the said Anna Desper, Administratrix of the Estate of Thomas J. Desper, Jr., Deceased, her attorneys, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators,

jointly and severally, firmly by these presents. Sealed with our seals and dated this 25th day of July in the year of our Lord one thousand nine hundred and fifty.

Whereas, lately at a session of the United States District Court for the Northern District of Illinois, Eastern Division, in a suit pending in said Court between Anna Desper, Administratrix of the Estate of Thomas J. Desper, Jr., Deceased, and Starved Rock Ferry Company, a corporation, a judgment was rendered against Starved Rock Ferry Company, a corporation, and in favor of Anna Desper, Administratrix of the Estate of Thomas J. Desper, Jr., Deceased, in the amount of Twenty Five Thousand Dollars ($25,000.00) and the said Starved Rock Ferry Company, a corporation, having filed in the Clerk's Office of the said District Court Notice of Appeal to the United States Court of Appeals for the Seventh Circuit, to reverse the judgment of the aforesaid suit, in the United States Court of Appeals for the Seventh Circuit, to be holden at Chicago within forty (40) days from the date hereof

Now, the condition of the above obligation is such, that if the said Starved Rock Ferry Company, a corporation, shall pay the costs if the appeal is dismissed or the judgment in full if affirmed, or pay such costs as the appellate court may award if the judgment is modified then the above obligation to be void; otherwise to remain in full force and virtue.

Sealed and delivered in presence of:

..... Starved Rock Ferry Company, a corporation

..... By: Charles Wolff (Seal

.....(Seal)

The Aetna Casualty and Surety Company

By Joseph J. Johnson

Attorney-in-fact & Resident Agent.

Approved by:
John P. Barnes
Judge

Jul 27, 1950

(Seal

Joseph I. Johnson

The Aetna Casualty and Surety Company, Hartford, Conn.)

434a State of Illinois,
County of Cook—ss.

I, H. W. Carlson, a Notary Public in and for said County and State, do hereby certify that * * * * Resident Vice-President, and * * * * Resident Assistant Secretary, Joseph I. Johnson Attorney in fact, of The Aetna Casualty and Surety Company, who is personally known to me to be the same person whose name is subscribed to the foregoing instrument, appeared before me this day in person, and acknowledged that he signed, sealed and delivered said instrument, for and on behalf of The Aetna Casualty and Surety Company, for the uses and purposes therein set forth.

Given under my hand and notarial seal, this 25th day of July, A. D. 1950

(Seal) H. W. Carlson,
My Commission Expires June 1st, 1952 Notary Public.

434 The AETNA CASUALTY AND SURETY COMPANY

Hartford, Connecticut
Certificate of Authority of Attorney(s)-in-Fact

KNOW ALL MEN BY THESE PRESENTS, That The Aetna Casualty and Surety Company, a corporation duly organized under the laws of the State of Connecticut, and having its principal office in the City of Hartford, County of Hartford, State of Connecticut, hath made, constituted and appointed, and does by these presents make, constitute and appoint Joseph I. Johnson, * * * of Chicago, Illinois, its true and lawful attorney(s), with full power and authority hereby conferred to sign, execute and acknowledge, at any place within the United States, or, if the following line be filled in, within the area there designated, the following instrument(s): for The Aetna Casualty and Surety Company, as surety, by his sole signature and act, any and all bonds, undertakings, and other writings obligatory in the nature of a bond, * * * * * * * * * * and to bind The Aetna Casualty and Surety Company thereby as fully and to the same extent as if the same were signed by the duly authorized officers of The Aetna Casualty and Surety Company, and all the acts of said Attorney(s), pursuant to the authority herein given, are hereby ratified and confirmed.

This appointment is made under and by authority of the following provisions of the by-laws of the Company which provisions are now in full force and effect and are the only applicable provisions of said by-laws.

ARTICLE IV—Section 8. The President, any Vice-President, or any Secretary may from time to time appoint Resident Vice-Presidents, Resident Assistant Secretaries, Attorneys-in-Fact, and Agents to act for and on behalf of the Company and may give any such appointee such authority as his certificate of authority may prescribe to sign with the Company's name and seal with the Company's seal bonds, recognizances, contracts of indemnity, and other writings obligatory in the nature of a bond, recognizance, or conditional undertaking, and any of said officers or the Board of Directors may at any time remove any such appointee and revoke the power and authority given him.

ARTICLE IV—Section 10. Any bond, recognizance, contract of indemnity, or writing obligatory in the nature of a bond, recognizance, or conditional undertaking shall be valid and binding upon the Company when (a) signed by the President or a Vice-President or by a Resident Vice-President, pursuant to the power prescribed in the certificate of authority of such Resident Vice-President, and duly attested and sealed with the Company's seal by a Secretary or Assistant Secretary or by a Resident Assistant Secretary, pursuant to the power prescribed in the certificate of authority of such Resident Assistant Secretary; or (b) duly executed (under seal, if required) by one or more Attorneys-in-Fact pursuant to the power prescribed in his or their certificate or certificates of authority.

In Witness Whereof, The Aetna Casualty and Surety Company has caused these presents to be signed by its Secretary, and its corporate seal to be hereto affixed, this 25th day of July, A.D., 1950.

The Aetna Casualty and Surety Company,
By J. A. Swearingen
Secretary.

State of Connecticut, County of Hartford—ss:

On this 25th day of July, A.D., 1950, before me personally came J. A. Swearingen, to me known, who, being by me duly sworn, did depose and say: that he is Secretary of The Aetna Casualty and Surety Company, the corporati

described in and which executed the above instrument, at its Home Office; that he knows the seal of said corporation; that the seal affixed to the said instrument is such corporate seal; and that he executed the said instrument on behalf of the corporation by authority of his office under the by-laws thereof.

Certificate No. 403348 John J. Tierney
(Seal) Notary Public
My Commission Expires Mar. 31, 1954

435 And afterwards on, to wit, the 4th day of August, 1950 came the Defendant-Appellant by its attorneys and filed in the Clerk's office of said Court its certain Statement Of Points in words and figures following, to wit:

436 IN THE DISTRICT COURT OF THE UNITED STATES

* * (Caption No.—49 C 481) * *

STATEMENT OF POINTS UPON WHICH DEFENDANT-APPELLANT RELIES ON APPEAL

Comes now Starved Rock Ferry Company, a corporation, and pursuant to the Rule 9 of the United States Court of Appeals for the Seventh Circuit, and pursuant to other relevant statutes and rules, and states that it will urge the following points in support of its appeal to the United States Court of Appeals for the Seventh Circuit.

1. The district court erred in denying defendant's motion to stay the proceedings in that court.
2. The district court erred in overruling defendant's motion for a directed verdict made at the close of the plaintiff's evidence.
3. The district court erred in overruling defendant's motion for a directed verdict made at the close of all the evidence.
4. The district court erred in overruling defendant's motion for a judgment notwithstanding the verdict of the jury.
5. The district court erred in overruling defendant's motion for a new trial on all or any of the following grounds:

437 a. The verdict is contrary to the law.

b. The verdict is against the manifest weight of the evidence.

c. The damages of $25,000.00 are so excessive as to show passion and prejudice.

d. The district court erred in instructing the jury according to instructions No. 1, as follows:

It is alleged in plaintiff's complaint that the defendant, Starved Rock Ferry Company, a corporation, whose principal place of business was at Starved Rock Park, LaSalle County, in the Northern District of Illinois, was in the business of operating ferry boats carrying passengers for hire on the Illinois River, a navigable river; that on and prior to April 26th, 1948, Thomas J. Desper, Jr., plaintiff's decedent, was a seaman employed as a river boat operator by the defendant for the year 1948 and to assist in the readying and fitting out of ferry boats of the said defendant to be used during the year 1948 in the Illinois River; that at the time of the accident in question, plaintiff's decedent, pursuant to said employment, was aiding in the readying and fitting out of defendant's ferry boats for operation in the Illinois River, and that all or part of decedent's duties as said employee were in actual navigation, or so closely and substantially affected navigation as to be a part thereof within the meaning of the said Merchant Marine Act; that at the time and place of the accident in question the decedent and the defendant were subject to the provisions of said Merchant Marine Act; that plaintiff's action is brought pursuant to the provisions of the said Act; that on said date a large loading boat or barge, owned, operated and maintained by the defendant, was moored in Edward's Run, a body of water in immediate proximity to the Illinois River, and the decedent was on said boat or barge, in the due course of his employment, near defendant's vice principal who was engaged in manipulating a nut on a certain fire extinguisher being prepared for use on one of said ferry boats of the defendant.

It is further alleged in plaintiff's complaint that at said time and place the said Starved Rock Ferry Company, a corporation, defendant, by its agent and servant, was guilty of negligence in one or more of the following particulars:

Carelessly and negligently failed to provide safe appliances, and then and there carelessly and negligently permitted and allowed said fire extinguish-

er to be upon said landing barge in a defective, insufficient, unsafe and dangerous condition;

Carelessly and negligently and without proper precaution opened said fire extinguisher so that gas contained therein at a high pressure was released with explosive force;

438 Carelessly and negligently failed to warn the decedent of the danger attendant upon the removal of the nut on said fire extinguisher, when it knew or, in the exercise of ordinary care, could have known that such an operation would be attended with great hazard and danger to persons nearby;

Carelessly and negligently failed to exercise ordinary care to furnish plaintiff's decedent with a safe place to work, contrary to and in violation of the Merchant Marine Act.

It is further alleged in said complaint that as a direct and proximate result and in consequence, in whole or in part, of one or more of the acts of negligence, or omissions, as above set forth, the said fire extinguisher or parts thereof were propelled with great force and violence against the decedent's body and inflicted injuries upon him which resulted in and caused his death on said date; that decedent left surviving him Anna Desper, his mother, who is now living and has sustained pecuniary loss and damage as a result of decedent's death.

If you believe from a preponderance of the evidence and under the instructions of the court that the decedent was so employed for the season of the year 1948, during which the defendant usually operated its said ferry boats, as a ferry boat operator and to aid in the fitting out and readying of said boats for such use in navigation on the Illinois River, and if you further believe from the evidence that it was part of decedent's duties as such an employee of the defendant to operate one of said ferry boats as the crew of said vessel on navigable waters, and that in performing said duties the decedent would be engaged in actual navigation or in work so closely and substantially affecting navigation as to be a part thereof, and if you further believe from the evidence that the defendant was at the time and place of said accident guilty of negligence in

one or more of the particulars above set forth and as alleged in plaintiff's complaint, and that such negligence, if any, was a proximate cause or proximately contributing cause, in whole or in part, of said accident and death of plaintiff's decedent, then you should find the defendant guilty.

e. The district court erred in instructing the jury according to instruction No. 2, as follows:

The jury are instructed that it is provided by an Act of Congress, which was in force as the law at the time plaintiff's decedent came to his death, that every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for
439 the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

The said Act of Congress further provides that any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

And another section of said act in full force and effect prior to April 26, 1948, provided that in all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the pro-

visions of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee.

It is provided in another Act of Congress that any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representatives of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable.

f. The district court erred in instructing the jury according to instruction No. 3, as follows:

If you believe from the preponderance of the evidence, under the instructions of the court, that a duly licensed operator operating any one of the ferry boats of the defendant, Starved Rock Ferry Company, a corporation, on the Illinois River, in defendant's business, during the regular season for such operation, was the crew of said vessel and engaged in actual navigation, or in work which so closely and substantially affected navigation as to be a part thereof, then the court instructs you that operation of said boats by a duly licensed operator employed by the defendant for said purpose would constitute said operator a seaman within the meaning of the Act of Congress known as the Merchant Marine Act; and the court further instructs you that under such circumstances said operator is the crew of the ferry boat.

The court further instructs you that if you believe from the preponderance of the evidence, under the instructions of the court, that the plaintiff's decedent, Thomas J. Desper, Jr., was employed by the defendant, Starved Rock Ferry Company, a corporation, to oper-

ate its ferry boats as a licensed operator for the season of 1948, and commenced work for said company in March, 1948, aiding in the work of readying and fitting out defendant's said ferry boats and the equipment used on said ferry boats for operation on the Illinois River during the year 1948, in the carriage of passengers for hire, and if you further find from all the facts and circumstances in evidence that any part of the duties of Thomas J. Desper, Jr., deceased, as an employee of said company, was the operation of one of said ferry boats as the crew of said vessel on navigable waters and that his work as such operator would be in actual navigation or in work which so closely and substantially affected navigation as to be a part thereof, then you should find that he was subject to the provisions of the Merchant Marine Act at the time and place of the accident and injuries which caused his death.

g. The district court erred in refusing to instruct the jury at the request of the defendant, as follows:

Before the plaintiff can recover in this case she must prove by a preponderance or greater weight of the evidence that her intestate, Thomas Desper, met his death in the course of his employment as a member of a crew of a vessel plying in navigable waters of the United States.

6. The district court erred in denying defendant's motion for leave to file an amended answer.

Dated at Chicago, Illinois, August 4th, 1950.

Angerstein & Angerstein
Attorneys for defendant-appellant
135 So. LaSalle Street,
Chicago, Illinois.
STate 2-0588

Received a copy of the foregoing statement of points upon which defendant-appellant relies this 4th day of August, 1950.

Joseph D. Ryan
Malone and Herbolsheimer
Attorneys for plaintiff-appellee.

441 And on the same day, to wit, on the 25th day of July, 1950, being one of the days of the regular July term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable John P. Barnes District Judge, appears the following entry, to wit:

442 IN THE DISTRICT COURT OF THE UNITED STATES

* * (Caption No.—49 C 481) * *

ORDER.

Comes now the defendant by its counsel and presents its supersedeas bond herein for approval and filing and, it appearing to the court that said bond is properly conditioned and in the amount fixed by the court, to-wit, the amount of Thirty Thousand Dollars ($30,000.00), and that the sureties are good and sufficient security for said amount, therefore, it is hereby ordered that said bond be and the same is hereby approved and that it may be filed with the clerk of this court.

John P. Barnes
Judge

Jul 27 1950

443 And on, to wit, the 27th day of July, 1950 came the Defendant-Appellant by its attorneys and filed in the Clerk's office of said Court its certain Designation Of Record in words and figures following, to wit:

444 IN THE DISTRICT COURT OF THE UNITED STATES

* * (Caption No.—49 C 481) * *

DESIGNATION OF RECORD.

The Clerk of the United States District Court, Northern District of Illinois, Eastern Division is hereby requested to make up an authenticated transcript of the record in the above entitled cause for appeal to the United States Court of Appeals for the Seventh Circuit, which shall include the following portions of the record, proceedings and evidence:

1. Complaint and Jury demand.
2. Summons.
3. Answer.
4. Motion for stay of proceedings filed January 16, 1950.

5. Order of February 7, 1950 overruling motion to stay proceedings.
6. Docket entry of April 19, 1950 showing selection and swearing of the jury.
7. Motion for leave to file amended answer and proposed amended answer filed April 20, 1950.
8. Order entered April 20, 1950 overruling motion for leave to file amended answer.

445 9. Order entered April 24, 1950 allowing plaintiff leave to file amended complaint.
10. Amended complaint.
11. Defendant's oral motion to strike paragraph 4 of the amended complaint.
12. Order entered April 24, 1950 overruling defendant's oral motion to strike paragraph 4 of the amended complaint.
13. Defendant's motion, filed April 24, 1950 at the close of the plaintiff's evidence, for a directed verdict of not guilty.
14. Order entered April 24, 1950 overruling defendant's motion, made at the close of the plaintiff's evidence, for a directed verdict of not guilty.
15. Defendant's motion, filed April 24, 1950 at the close of all the evidence, for a directed verdict of not guilty.
16. Order entered April 24, 1950 overruling defendant's motion made at the close of all of the evidence, for a directed verdict of not guilty.
17. Answer to amended complaint, filed April 25, 1950.
18. Verdict of the Jury.
19. Reply to answer to amended complaint.
20. Judgment entered April 26, 1950.
21. Motion for judgment notwithstanding the verdict, filed May 5, 1950.
22. Motion for a new trial, filed May 5, 1950.
23. Order entered May 25, 1950 allowing defendant to amend motion for a new trial on its face.
24. Order entered June 28, 1950 overruling defendant's motions for judgment notwithstanding the verdict and for a new trial.
25. Notice of Appeal together with certificate of clerk of mailing same.
26. Supersedeas bond.
27. Transcript of proceedings.

28. All exhibits admitted in evidence, except plaintiff's exhibits 6, 7 and 8.
29. All exhibits offered by defendant but not admitted in evidence.
30. This designation of the record, together with proof of service thereof.

446 31. Statement of points relied upon by appellant on Appeal, together with proof of service thereof.

32. All orders hereafter entered herein.
33. All documents hereafter filed.

The said Clerk is also hereby requested to transmit to the United States Court of Appeals for the Seventh Circuit, on appeal in the above entitled cause, physically, Plaintiff's Exhibits Nos. 6, 7 and 8.

Dated at Chicago, Illinois this 27th day of July, 1950.

Angerstein & Angerstein
Charles T. Shanner
Attorneys for Starved Rock Ferry Company, a corporation, defendant-appellant.
135 South LaSalle Street
Chicago 3, Illinois
STate 2-0588

The undersigned, being the attorneys for plaintiff-appellee in the above cause, do hereby acknowledge receipt of a copy of the foregoing Designation of Record this 26 day of July, 1950.

Joseph D. Ryan
Malone & Herbolsheimer
Attorneys for plaintiff-appellee

447 And afterwards on, to wit, the 9th day of August, 1950 came the Parties by their attorneys and filed in the Clerk's office of said Court their certain Stipulation in words and figures following, to wit:

448 IN THE DISTRICT COURT OF THE UNITED STATES

* * (Caption No.—49 C 481) * *

STIPULATION

It is hereby stipulated by and between the parties hereto, by their attorneys respectively, that the instructions to the jury appearing in the Transcript of Proceedings as instructions numbered "1", "2" and "3" in the court's charge to the jury are the same and identical instructions

referred to as plaintiff's instructions "L", "A", and "B" respectively in the said Transcript of Proceedings and that defendant's rejected instruction number 5 is in words and figures as follows:

"Before the plaintiff can recover in this case she must prove by a preponderance or greater weight of the evidence that her intestate, Thomas Desper, met his death in the course of his employment as a member of a crew of a vessel plying in navigable waters of the United States."

Dated Chicago, Illinois, July 26, 1950.

Joseph D. Ryan and
Malone & Herbolsheimer
Attorneys for Plaintiff
Angerstein & Angerstein
Attorneys for Defendant

449 And on the same day, to wit, on the 9th day of August, 1950, being one of the days of the regular August term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Walter J. La Buy District Judge, appears the following entry, to wit:

450 IN THE DISTRICT COURT OF THE UNITED STATES

* * (Caption No.—49 C 481) * *

ORDER

This cause coming on to be heard on motion of defendant to clarify the designations of the instructions to the jury as they appeared in the transcript of proceedings and to incorporate into the record defendant's tendered and rejected instruction number 5 and by virtue of the stipulation of the parties,

It is hereby ordered that the instructions designated as numbers, "1", "2", and "3", in the court's charge to the jury are and shall be considered the same and identical instructions referred to as plaintiff's instructions, "L", "A" and "B" respectively in the transcript of proceedings,

And it is further ordered that defendant's tendered and rejected instruction number 5 is in words and figures, as follows:

"Before the plaintiff can recover in this case she must prove by a preponderance or greater weight of the evidence that her intestate, Thomas Desper, met his death in the course of his employment as a member

of a crew of a vessel plying in navigable waters of the United States."

and that said rejected instruction may be incorporated
451 into and the same is hereby considered a part of the record in this cause.

Walter J. LaBuy
Judge

Aug 9 1950

452 And afterwards on, to wit, the 11th day of August, 1950 came the Defendant by its attorneys and filed in the Clerk's office of said Court its certain Notice in words and figures following, to wit:

453 IN THE DISTRICT COURT OF THE UNITED STATES

(Caption No.—49 C 481)

NOTICE.

To: Joseph D. Ryan,
100 North LaSalle Street
Chicago, Illinois

Please Take Notice, that on Friday, August 11, 1950, at the opening of court or as soon thereafter as counsel can be heard, we shall appear before the Honorable Walter J. Labuy, Judge of said court, sitting in the room usually occupied by him in the Old Post Office Building, or before such other judge sitting in his place instead, and shall then and there ask leave of court for an order to include the original exhibits offered at the trial and the original stenographic report of proceedings at the trial in lieu of copies thereof in the transcript of record on appeal to the Circuit Court of Appeals, 7th Circuit, at which time and place you may appear if you so see fit to do.

Angerstein & Angerstein

Received a copy of the foregoing notice and order this 10th day of August, 1950.

Joseph D. Ryan
M.

454 And on the same day, to wit, on the 11th day of August, 1950, being one of the days of the regular April term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Walter J. LaBuy, District Judge, appears the following entry, to wit:

455 IN THE DISTRICT COURT OF THE UNITED STATES
* * (Caption No.—49 C 481) * *

ORDER.

This cause coming on to be heard on defendant's motion for leave to incorporate the original exhibits offered at the trial and the original stenographic report of proceedings of the trial in the transcript of record on appeal,

Leave is hereby given and it is hereby ordered that the original exhibits offered at the trial and the original reporter's stenographic report of the proceedings of the trial shall be incorporated in the transcript of record for transmission to the Circuit Court of Appeals, 7th Circuit, in the appeal of this case.

Walter J. LaBuy
Aug. 11, 1950. Judge

456 United States of America) ss.
Northern District of Illinois)

I, Roy H. Johnson, Clerk of the United States District Court for the Northern District of Illinois, do hereby certify the above and foregoing to be a true and complete transcript of the proceedings had of record made in accordance with the Designation filed in this Court in the cause entitled: Anna Desper, Administratrix of the Estate of Thomas J. Desper, Jr., Deceased, Plaintiff, vs. Starved Rock Ferry Company, a corporation, Defendant, No. 49 C 481, as the same appear from the original records and files thereof now remaining among the records of the said Court in my office, except the Original Transcript Of Proceedings and the Original Exhibits which are incorporated herein by direction of this Court.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid
(Seal) Court at Chicago, Illinois, this 1st day of September, 1950.

Roy H. Johnson
Clerk
By Gizella Butcher
Deputy Clerk

UNITED STATES COURT OF APPEALS.

For the Seventh Circuit.

Chicago 10, Illinois.

I, Kenneth J. Carrick, Clerk of the United States Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages contain a true copy of the printed transcript of record, filed October 20, 1950, in:

Cause No. 10257

Anna Desper, Administratrix of the Estate of Thomas J. Desper, Jr., Deceased,
Plaintiff-Appellee,

vs.

Starved Rock Ferry Company, a corporation,
Defendant-Appellant

as the same remains upon the files and records of the United States Court of Appeals for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Court of Appeals for the Seventh Circuit, at the City of Chicago, this 21st day of May, A. D. 1951.

Kenneth J. Carrick,
(Seal) *Clerk of the United States Court of Appeals for the Seventh Circuit.*

At a regular term of the United States Court of Appeals for the Seventh Circuit, held in the City of Chicago and begun on the third day of October, in the year of our Lord one thousand, nine hundred and fifty, and of our Independence the one hundred seventy-fifth:

Anna Desper, Administratrix of the Estate of Thomas J. Desper, Jr., Deceased, *Plaintiff-Appellee,* vs. Starved Rock Ferry Company, a corporation, *Defendant-Appellant.*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 10257	

And afterward, to-wit, on the ninth day of February, 1951, the following further proceedings were had and entered of record, to-wit:

UNITED STATES COURT OF APPEALS.

For the Seventh Circuit.

Chicago 10, Illinois.

Friday, February 9, 1951.

Before:

Hon. Otto Kerner, Circuit Judge.
Hon. Walter C. Lindley, Circuit Judge.
Hon. H. Nathan Swaim, Circuit Judge.

Anna Desper, Administratrix of the Estate of Thomas J. Desper, Jr., Deceased, *Plaintiff-Appellee,* vs. Starved Rock Ferry Company, a corporation, *Defendant-Appellant.*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

Now this day come the parties by their counsel, and this cause comes on to be heard on the transcript of record and the briefs of counsel and on oral argument by Mr. Charles Wolff, counsel for the appellant, and by Mr. Joseph D. Ryan, counsel for the appellee, and the Court takes this matter under advisement.

And afterward, to-wit, on the twentieth day of March, 1951, there was filed in the office of the Clerk of this Court the opinion of the Court which said opinion is in the words and figures following, to-wit:

UNITED STATES COURT OF APPEALS.

For the Seventh Circuit.

No. 10257. October Term, 1950, January Session, 1951.

Anna Desper, Administratrix of the Estate of Thomas J. Desper, Jr., Deceased,
Plaintiff-Appellee,
vs.
Starved Rock Ferry Company, a corporation,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

March 20, 1951.

Before Kerner, Lindley and Swaim, Circuit Judges.

LINDLEY, *Circuit Judge.* This is an action under the Jones Act, 46 U. S. C. A., Sec. 688, for damages for the death of plaintiff's intestate, Thomas J. Desper, Jr., as a result of injuries sustained by him in the course of his employment by defendant. A jury found for plaintiff, assessing her damages at $25,000. From the judgment entered on the verdict, defendant appeals.

Defendant is an Illinois corporation engaged in the operation of sight-seeing motor-boats on the Illinois River in the vicinity of Starved Rock. Plaintiff's intestate was first employed by defendant in April, 1947. He assisted in the preparation of the latter's motor launches and barges for the summer season, which extended from June 1 to the end of October, and, after procuring, on June 17, 1947, a Department of Commerce license "to operate or navigate motor boats carrying passengers for hire," served

as an operator of defendant's launches for the balance of the 1947 season. Defendant had five such vessels, manned by licensed crewmen and operated pursuant to Coast Guard regulations. At the close of the season, Desper helped take the boats and barges off the river and prepare them for the winter. The barges, none of which had any motive power, were floated into a shallow inlet known as Edwards Run, which was utilized by defendant as winter quarters, and there anchored to the bank; the motor launches were taken out of the water and blocked up on marine tracks on land adjacent thereto. This work was completed and Desper's employment terminated on December 19, 1947.

On March 15, 1948, Desper again entered defendant's employment. Although there was testimony to the effect that he was hired for the season and was to be employed as an operator once the boats were in the water, the work he actually performed from the date of his reemployment until his death consisted of cleaning, painting, varnishing and water-proofing the vessels and engaging in various other related activities necessarily involved in readying them for the summer season. On April 26, the date on which the accident occurred, the launches were still blocked up on rails and the barges lying in Edwards Run. The largest of the latter was a houseboat in which defendant's manager had year-round living quarters and which was also used as a machine and tool shop, warehouse, ticket office and waiting room. Five or six men were on this barge, spraying life preservers which were to be used on the sight-seeing boats, and defendant's president, one Birkenbuel, was also there, working on a fire extinguisher. This extinguisher exploded, killing Birkenbuel and plaintiff's intestate.

Both plaintiff and defendant filed applications for adjustment of claim with the Industrial Commission of Illinois, the defendant on January 6, 1949, and the plaintiff on March 28, 1949, seven days after filing her complaint in the instant action in the District Court. After hearing, an arbitrator decided that the provisions of the Illinois Workmen's Compensation Act were applicable and that under Section 7 (b) thereof (Ill. Rev. Stat. 1949, Ch. 48, Sec. 144 (b)), plaintiff was entitled to compensation in the amount of $19.50 per week for 266 weeks and $13.00 for one additional week. Defendant's tender of the amount of compensation which had already accrued and its offer

to pay the balance of the award were immediately rejected by plaintiff, who filed with the commission a petition for review, alleging that the commission lacked jurisdiction and praying that the order be vacated. The pendency of this petition for review was urged by defendant in support of its motion to stay the proceedings in the instant case,—a motion predicated on its contention that the commission's decision, subject to review by the courts of Illinois, would be determinative of plaintiff's right to the relief prayed. The District Court, however, overruled the motion and the suit proceeded to judgment as related.

It is defendant's position that plaintiff's intestate, Desper, was not a "seaman" within the meaning of the Jones Act and that plaintiff, therefore, has no right to maintain an action for damages for his death in the course of his employment, but has available to her only the remedy afforded by the Illinois Workmen's Compensation statute. It is urged that the District Court erred in taking the contrary position and, more particularly, in denying defendant's motion for a stay, in refusing to direct a verdict for defendant, in giving certain instructions submitted by plaintiff and failing to give an instruction offered by defendant, and in overruling defendant's motion for judgment notwithstanding the verdict.

The Jones Act, 46 U. S. C. A. Sec. 688, provides that "Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable." Jurisdiction in such actions lies in the court of the district in which the defendant employer resides or in which his principal office is located. The language employed makes it readily apparent that the benefits of the Act are available only to (1) a "seaman" who has been injured in the course of his employment or (2) "the personal representative of such seaman," in the event the injuries received result in his death, and that

the crucial question presented on this appeal is whether Desper, the plaintiff's intestate, was a "seaman" within the meaning of the Act, so as to confer on his personal representative the right to maintain this action.[1] Both parties, however, have advanced arguments which tend to broaden this issue, defendant contending that the fatal accident occurred on non-navigable waters, apparently on the theory that this fact, if true, precludes the maintenance of plaintiff's suit under the Jones Act, and plaintiff urging that the 1939 Amendment to the Federal Employers Liability Act, 53 Stat. 1404, 45 U. S. C. A. Sec. 51, has so enlarged the meaning of the term "seaman," as used in the Jones Act, as to bring within its scope not only one who is "engaged in actual navigation" but also one who is engaged in "work so closely and substantially affecting navigation as to be a part thereof."

That it is wholly immaterial whether the fatal injury suffered by plaintiff's intestate was inflicted on navigable or non-navigable waters, is clear from the decision in *O'Donnell* v. *Great Lakes Co.*, 318 U. S. 36, in which the Supreme Court, after observing, at page 39, that "There is nothing in the legislative history of the Jones Act to indicate that its words 'in the course of his employment' do not mean what they say or that they were intended to be restricted to injuries occurring on navigable waters," concluded, at page 42: "The right of recovery in the Jones Act is given to the seaman as such, and, as in the case of maintenance and cure, the admiralty jurisdiction over the suit depends *not on the place where the injury is inflicted but on the nature of the service* and its relationship to the operation of the vessel plying in navigable waters. * * * It follows that the Jones Act, in extending a right of recovery to the seaman injured while in the service of his vessel by negligence, has done no more than supplement the remedy of maintenance and cure for injuries suffered by the seaman, *whether on land or sea*, by giving to him the indemnity which the maritime law afforded to a seaman injured in consequence of the unseaworthiness of the vessel or its tackle." (Emphasis supplied.) In this case, then, plaintiff's right to recover is dependent on the status of the decedent rather than on

1. Defendant does not deny that Desper's death resulted from injuries sustained in the course of his employment, nor does it contend that, insofar as the question of negligence is concerned, the evidence was insufficient to sustain the verdict against it.

the situs of the injury which resulted in his death; if Desper was a "seaman" within the meaning of the Jones Act, plaintiff is entitled to maintain this action irrespective of whether his death occurred on navigable or non-navigable waters or even on dry land; if he was not such a "seaman," she is not so entitled even though his death occurred on admittedly navigable waters, but is restricted to the remedy afforded by the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. A., Sec. 901 *et seq.* *Swanson* v. *Marra Brothers, Inc.*, 328 U. S. 1, 4-7.

In considering plaintiff's contention that the 1939 Amendment to the Federal Employers' Liability Act broadened the meaning of the term "seaman," as used in the Jones Act, the history of that Act and related statutes and the decisions based thereon are enlightening. The Act was passed in 1920, subsequent to the Supreme Court's determination, in *Chelentis* v. *Luckenback Steamship Co.*, 247 U. S. 372, that Section 20 of the Seaman's Welfare Act, 38 Stat. 1152,[2] effectuated no change in the general maritime law. The Act's express provision that a seaman injured in the course of his employment might, "at his election, maintain an action for damages at law," and the incorporation therein of "all statutes of the United States conferring or regulating the right of action for death in the case of railway employees," overcame the objection, expressed by the court in the *Chelentis* case, 247 U. S. at page 384, that the earlier legislation disclosed no intention "to give the complaining party an election to determine whether the defendant's liability shall be measured by common-law standards rather than those of the maritime law," and effectively abolished the fellow-servant rule in cases where such election was exercised. In the *Haverty* case, *International Stevedoring Co.* v. *Haverty*, 272 U. S. 50, Congress' power to change the maritime law by making provision for such an election was recognized, and the court, in construing the act, held that, although for most purposes stevedores are not regarded as seamen, "in this statute, 'seaman' is to be taken to include stevedores employed in maritime work on navigable waters * * *."

Less than a year after the decision in the *Haverty* case, Congress enacted the Longshoremen's and Harbor Work-

2. "In any suit to recover damages for any injury sustained on board vessel or in its service seamen having command shall not be held to be fellow-servants with those under their authority."

ers' Compensation Act, 33 U. S. C. A., Sec. 901 *et seq.*, providing for the payment of compensation to an employee injured "upon the navigable waters of the United States," but expressly excluding from its coverage "a master or member of a crew of any vessel." In *Frankel v. Bethlehem-Fairfield Shipyard, Inc.*, 46 F. Supp. 242, 249, affirmed 132 F. 2nd 634, cert. denied 319 U. S. 746, the court, holding that the Longshoremen's Act "necessarily limits the scope of 'seaman' in the Jones Act to a maritime employee who can be considered the master or member of the crew of a vessel," concluded that the plaintiff in that case could not be classified as a seaman "as his duties had no direct relation to navigation." And in *Swanson v. Marra Brothers*, 328 U. S. 1, 7, the Supreme Court adopted the same construction, holding that "the effect * * * of the Longshoremen's Act is to confine the benefits of the Jones Act to the members of the crew of a vessel plying in navigable waters and to substitute for the right of recovery recognized by the *Haverty* case only such rights to compensation as are given by the Longshoremen's Act." This decision clearly demonstrates that, since the passage of the Longshoremen's Act, the court has retreated from the position taken in the *Haverty* case and has narrowed the Jones Act concept of "seaman" to the point where it includes only one who is a member of the crew of a vessel plying in navigable waters.

Plaintiff, however, while contending that the evidence is sufficient to establish that the decedent was a member of the crew of a vessel and, thus, in any event, a "seaman" within the meaning of the Jones Act, takes the position that the 1939 Amendment to the Federal Employers Liability Act, 53 Stat. 1404, which provides that "Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter," considered in conjunction with the Jones Act proviso that statutes "modifying or extending the common-law right or remedy in cases of personal injury to railway employees" shall apply in actions by seamen, has so broadened the concept of "seaman" as to bring within its scope one whose work "closely and substantially" affects

navigation. Plaintiff's theory is that, because any employee of a carrier whose work substantially affects interstate commerce is covered by the Federal Employers Liability Act, it follows that any employee whose work affects navigation is covered by the Jones Act. This position is, we think, unsound, for the Jones Act incorporates only those statutes "conferring or regulating the right of action for death in the case of railway employees" and the 1939 Amendment to the F. E. L. A. is not such a statute, for it is concerned only with the question of the coverage of the Act, with the determination of what "employees" are entitled to its benefits. It is, in short, nothing more than a definition of the term "employee" for the purposes of the F. E. L. A., and cannot reasonably be construed as a redefinition of the term "seaman," as used in the Jones Act.

Defendant contends that the trial court's first three instructions to the jury clearly reflect that court's adoption of the plaintiff's argument that the 1939 Amendment of the F. E. L. A., had the effect of broadening the Jones Act concept of "seaman," and that giving such instructions constituted reversible error. That defendant's contention is not without merit is best illustrated by the quotation of instruction number 1 which reads, in pertinent part:

> "If you believe * * * that a duly licensed operator operating any one of the ferry boats of the defendant * * * during the regular season for such operation, was the crew of said vessel and engaged in actual navigation or in work which was so closely and substantially affected navigation as to be a part thereof, then the court instructs you that operation of said boats by a duly licensed operator * * * would constitute said operator a seaman within the meaning of the * * * Merchant Marine Act; and the court further instructs you that under such circumstances said operator is the crew of the ferry boat.
>
> "The court further instructs you that if you believe * * * that the plaintiff's decedent * * * was employed by the defendant to operate its ferry boats as a licensed operator for the season of 1948, and commenced work * * * in March, 1948, aiding in the work of readying and fitting out defendant's said ferry boats * * * for operation on the Illinois River * * * and if you further find * * * that any part of the duties of * * * deceased * * * was the operation of one of

said ferry boats as the crew of said vessel on navigable waters and that his work as such operator would be in actual navigation or in work which so closely and substantially affected navigation as to be a part thereof, then you should find that he was subject to the provisions of the Merchant Marine Act * * *."

Furthermore, inasmuch as this instruction is based upon that interpretation of the evidence which is most favorable to plaintiff, it presents the further question whether the court below erred, as defendant insists it did, in failing to find that such evidence was insufficient, as a matter of law, to constitute plaintiff's decedent a "seaman," and in denying defendant's motion for a directed verdict.

In *Nogueira* v. *N. Y., N. H. & H. R. Co.*, 281 U. S. 128, 136, in *Warner* v. *Goltra*, 293 U. S. 155, 159-60, and again in *South Chicago Co.* v. *Bassett*, 309 U. S. 251, 256-257, the Supreme Court has pointed out that the legislative history of the Longshoremen's and Harbor Workers' Compensation Act leads to the conclusion that the term "master or member of a crew of any vessel," as used in that Act, is synonymous with the term "seaman," as used in the Jones Act. In *Swanson* v. *Marra Brothers*, 328 U. S. 1, 7, decided in 1946, some seven years after the enactment of the F. E. L. A. Amendment on which plaintiff relies, the court not only reiterated this conclusion but went a step farther, stating that the effect of the Longshoremen's Act was to "confine the benefits of the Jones Act to the crew of a vessel *plying in navigable waters.*" (Emphasis supplied.) The phrase, "plying in navigable waters," is not we believe, to be construed as meaning that the vessel must, at the very moment of the injury, have been actually in motion on navigable waters, but is, rather, to be interpreted as meaning that the person injured must have been a member of the crew of a vessel which was engaged in navigation as distinguished from one which had been withdrawn from navigation. In the case at bar, there was no vessel so engaged; all of defendant's boats and barges had been withdrawn from navigation for the winter and laid up in winter quarters, and until such time as they should once again be placed in service, they were not engaged in navigation and plaintiff's decedent, was not, therefore, a "seaman" within the meaning of the Jones Act—*i. e.*, a master or member of the crew of a vessel engaged in navigation. *Swanson* v. *Marra Broth-*

ers, 328 U. S. 1, 7. This conclusion finds support in the decisions rendered in *Hawn* v. *American S.S. Co.,* 107 F. 2nd 999, 1000 (C. A. 2), where the court, in affirming the trial court's direction of a verdict for the defendant in a case where the plaintiff was injured while employed with others in moving a vessel from one position alongside a dock to another at which it was taking on cargo for storage, stated that, although navigation "does not cease when the ship is in drydock for repairs, awaiting new business," a ship "is withdrawn from navigation, if laid up for the winter," and in *Antus* v. *Interocean S. S. Co.,* 108 F. 2nd 185, 187 (C. A. 6), where the court, affirming the dismissal of a suit filed under the Jones Act by one who had been a member of the ship's crew and was injured while helping prepare the vessel for winter quarters, stated: "The fact that he had been, or expected in the future to be, a seaman does not render maritime work which was not maritime in its nature." *Cf. Taylor* v. *McManigal,* 89 F. 2nd 583 (C. A. 6). Of the cases cited by the plaintiff, the only one which allowed a recovery under the Jones Act where the ship was not in actual navigation, *Hunt* v. *United States,* 17 F. Supp. 578, merely serves to emphasize the factors lacking in the case at bar, which serve to make one a seaman for the purposes of the Act. In the *Hunt* case, the vessel on which the accident occurred was in drydock undergoing repairs and, thus, was not "withdrawn from navigation" as were the boats involved in the case at bar, which had been "laid up for the winter," *Hawn* v. *American S.S. Co.,* 107 F. 2nd 999, 1000 (C. A. 2). A second significant difference is that the plaintiff in that case was living on board the vessel and was subject to ship's discipline as a member of the crew.

In the light of the foregoing authorities, we can only conclude that plaintiff's decedent was not, at the time of his death, a "seaman" within the meaning of the Jones Act and that the trial court erred in instructing the jury and in failing to grant defendant's motion for a directed verdict. Consequently, the judgment is reversed and the cause remanded with directions to enter judgment for defendant.

And on the same day, to-wit, on the twentieth day of March, 1951, the following further proceedings were had and entered of record, to-wit:

UNITED STATES COURT OF APPEALS.

For the Seventh Circuit.

Chicago 10, Illinois.

Tuesday, March 20, 1951.

Before:

Hon. Otto Kerner, Circuit Judge.
Hon. Walter C. Lindley, Circuit Judge.
Hon. H. Nathan Swaim, Circuit Judge.

Anna Desper, Administratrix of the Estate of Thomas J. Desper, Jr., Deceased, *Plaintiff-Appellee,* vs. Starved Rock Ferry Company, a corporation, *Defendant-Appellant.*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 10257	

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, Reversed and Remanded.

And afterward, to-wit, on the thirtieth day of March, 1951, the following further proceedings were had and entered of record, to-wit:

UNITED STATES COURT OF APPEALS.

For the Seventh Circuit.

Chicago 10, Illinois.

Friday, March 30, 1951.

Before:

Hon. Walter C. Lindley, Circuit Judge.

Anna Desper, Administratrix of the Estate of Thomas J. Desper, Jr., Deceased, *Plaintiff-Appellee,* vs. Starved Rock Ferry Company, a corporation, *Defendant-Appellant.*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 10257	

On motion of counsel for the plaintiff-appellee and pursuant to stipulation of counsel, It Is Ordered that the time for filing the appellee's petition for rehearing herein be, and the same is hereby, extended to and including April 24, 1951.

And afterward, to-wit, on the twenty-fourth day of April, 1951, there was filed in the office of the Clerk of this Court a petition for rehearing which said petition for rehearing is not copied herein.

And afterward, to-wit, on the first day of May, 1951, the following further proceedings were had and entered of record, to-wit:

UNITED STATES COURT OF APPEALS.

For the Seventh Circuit.

Chicago 10, Illinois.

Tuesday, May 1, 1951.

Before

Hon. Walter C. Lindley, Circuit Judge.

Anna Desper, Administratrix of the Estate of Thomas J. Desper, Jr., Deceased, *Plaintiff-Appellee,* vs. Starved Rock Ferry Company, a corporation, *Defendant-Appellant.*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 10257	

Pursuant to stipulation of counsel, it is ordered that the time within which the defendant-appellant may file its reply to the plaintiff-appellee's petition for rehearing be, and the same is hereby, extended to and including May 18, 1951.

And afterward, to-wit, on the fourteenth day of May, 1951, the following further proceedings were had and entered of record; to-wit:

UNITED STATES COURT OF APPEALS.

For the Seventh Circuit.

Chicago 10, Illinois.

Monday May 14, 1951.

Before:

Hon. Otto Kerner, Circuit Judge.
Hon. Walter C. Lindley, Circuit Judge.
Hon. H. Nathan Swaim, Circuit Judge.

Anna Desper, Administratrix of the Estate of Thomas J. Desper, Jr., Deceased, *Plaintiff-Appellee,* vs. Starved Rock Ferry Company, a corporation, *Defendant-Appellant.*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 10257	

It is ordered by the Court that the petition for a rehearing of this cause be, and the same is hereby, Denied.

And afterward, to-wit, on the fifteenth day of May, 1951, there was filed in the office of the Clerk of this Court an answer to the petition for rehearing which said answer to the petition for rehearing is not copied herein.

And on the same day, to-wit, on the fifteenth day of May, 1951, there was filed in the office of the Clerk of this Court a designation of record which said designation is in the words and figures following, to-wit:

State of Illinois, }
County of Cook. } ss.

IN THE UNITED STATES COURT OF APPEALS.

For the Seventh Circuit.

Anna Desper, Administratrix of the Estate of Thomas J. Desper, Jr., Deceased,
Plaintiff-Appellee,
vs.
Starved Rock Ferry Company, a corporation,
Defendant-Appellant.
} No. 10257

DESIGNATION OF RECORD ON PETITION FOR CERTIORARI.

Anna Desper, Administratrix of the Estate of Thomas J. Desper, Jr., deceased, hereby designates the following portions of the record in the Court of Appeals for inclusion in the record on certiorari in the United States Supreme Court:

1. Order taking cause under advisement.
2. Opinion.
3. Judgment.
4. Order extending time for rehearing.
5. Reference to filing petition for rehearing.
6. Reference to answer to petition for rehearing.
7. Order denying rehearing.
8. This designation.
9. Any orders entered or papers filed herein after the date hereof.

Joseph D. Ryan,
Louis P. Miller,
Louis G. Davidson,
Attorneys for Plaintiff-Appellee.

Received a copy of the foregoing Designation of Record on Petition for Certiorari this 15th day of May, A. D. 1951.

Thomas C. Angerstein,
Charles Wolff,
Charles T. Shanner,
George W. Angerstein,
Attorneys for Defendant-Appellant.

Endorsed: Filed May 15, 1951, Kenneth J. Carrick, Clerk.

UNITED STATES COURT OF APPEALS.

For the Seventh Circuit.

Chicago 10, Illinois.

I, Kenneth J. Carrick, Clerk of the United States Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages contain a true copy of the papers filed and proceedings had, made in accordance with the designation of record, filed May 15, 1951, in:

Cause No. 10257

Anna Desper, Administratrix of the Estate of Thomas J. Desper, Jr., Deceased,
Plaintiff-Appellee,

vs.

Starved Rock Ferry Company, a corporation,
Defendant-Appellant.

as the same remains upon the files and records of the United States Court of Appeals for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Court of Appeals for the Seventh Circuit, at the City of Chicago, this 21st day of May, A. D. 1951.

Kenneth J. Carrick,
(Seal) *Clerk of the United States Court of Appeals for the Seventh Circuit.*

[fol. 291] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1951

No. 231

ANNA DESPER, Administratrix of the Estate of Thomas J. Desper, Jr., Deceased, Petitioner,

vs.

STARVED ROCK FERRY COMPANY, a Corporation

ORDER ALLOWING CERTIORARI—Filed October 15, 1951

The petition herein for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit is granted. The case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Office-Supreme Court, U. S.
FILED
AUG 10 1951
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 231

ANNA DESPER, Administratrix of the Estate of THOMAS J. DESPER, JR., Deceased,

Petitioner,

vs.

STARVED ROCK FERRY COMPANY, a corporation,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

JOSEPH D. RYAN,
100 N. La Salle Street,
Chicago, Illinois,
Attorney for Petitioner.

CHAMPLIN-SHEALY COMPANY, CHICAGO 888

INDEX AND TABLE OF CASES.

	PAGE
Opinion Below	2
Jurisdictional Statement	2
The Questions Presented	2-4
Statutes Involved	4
Summary and Short Statement of the Matter Involved	5
Reasons Relied On for the Allowance of the Writ	8-20
Appendix (Opinion of the Court of Appeals)	i

STATUTES.

The Jones Act, 41 Stat. 1007, 46 U. S. C. A. Sec. 688	4
The 1939 amendment of the F.E.L.A., 53 Stat. 1404, 45 U. S. C. A. Sec. 51	4, 5

CITATIONS.

Antus v. Interocean S. S. Co., 108 F. 2d 185, 187 (6th Cir.)	12, 13
Bailey v. Central Vt. Ry. Co., 319 U. S. 350	19
B. and O. S. W. R. R. v. Burtch, 263 U. S. 540, 543	9
Baskin v. Industrial Accident Commission, 338 U. S. 854	8
Bethlehem Steel Co. v. Moores, 335 U. S. 874	8
Bowen v. Shamrock Towing Co., 139 F. 2d 674 (2d Cir.)	18
California v. Zook, 336 U. S. 725, 728	17
Cantey v. McLain Line, 312 U. S. 667, reversing 32 F. S. 1023, 114 F. 2d 1017	18
Carumbo v. Cape Cod S. S. Co., 123 F. 2d 991, 995 (1st Cir.)	14
Chicago and N. W. R. Co. v. Bower, 241 U. S. 470	8
Cont. Cas. Co. v. Lawson, 64 F. 2d 802 (5th Cir.)	16
Cortes v. Baltimore Insular Line, 287 U. S. 367, 375	9
Daffin v. Pape, 170 F. 2d 622, 625 (5th Cir.)	14, 15
Davis v. Department of Labor, 317 U. S. 249	8

De Zon v. American President Lines, 318 U. S. 660, 661 20
Ellis v. U. P. R. R. Co., 329 U. S. 649 19
Frankel v. Bethlehem-Fairfield Shipyard, Inc., 46 F. S. 242, 249, 132 F. 2d 634 (4th Cir.), cert. den. 319 U. S. 746 ..... 12, 13
Gahagan Const. Corp. v. Armao, 165 F. 2d 301, 305, 307 (1st Cir.), cert. den. 333 U. S. 876 18
Garrett v. Moore-McCormack Co., 317 U. S. 239, 248 ..9, 17
Gonzales v. U. S. Emergency Fleet Corp., 3 F. 2d 168, 170 (E. D. N. Y.) 13, 14
Grand Trunk Western R. Co. v. Lindsay, 233 U. S. 42 9
Hawn v. American S. S. Co., 107 F. 2d 999 (2d Cir.) .. 12, 13
Hillcone S. S. Co. v. Steffen, 136 F. 2d 965 (9th Cir.) .. 14
Hunt v. United States, 17 F. S. 578, 91 F. 2d 1014 (2d Cir.), cert. den. 302 U. S. 752 ..... 14, 15
Industrial Com. v. Davis, 259 U. S. 182, 185 9
International Stevedoring Co. v. Haverty, 272 U. S. 50 9
Jamison v. Encarnacion, 281 U. S. 635 9
John Baizley Iron Works v. Span, 281 U. S. 222, 232 .. 14
Jones v. Shepherd, 20 F. S. 345, 346 (S. D. Miss.) 14, 15
Lavender v. Kurn, 327 U. S. 645 19
Lilly v. Grand Trunk Western R. Co., 317 U. S. 481 .. 19
Marceau v. Great Lakes Transit Corp., 146 F. 2d 416, 418, cert. den. 324 U. S. 872 ..... 7, 8
Maryland Cas. Co. v. Lawson, 101 F. 2d 732 (5th Cir.) 16
New Bedford Dry Dock Co. v. Purdy, 258 U. S. 96 14
New York Cent. and H. R. R. Co. v. Carr, 238 U. S. 260, 263 8
Nordquist v. U. S. Trust Co. of N. Y., 188 F. 2d 776 (2d Cir.) 17
Norfolk and W. R. Co. v. Earnest, 229 U. S. 114 9
North Pac. S. S. Co. v. Hall Bros., 249 U. S. 119, 128 .. 14
Norton v. Warner Co., 321 U. S. 565 18
O'Donnell v. Great Lakes Dredge and Dock Co., 318 U. S. 36 ..... 7, 9, 12
Overstreet v. North Shore Corp., 318 U. S. 125, 131, 132 10

Schantz v. American Dredging Co., 138 F. 2d 534 (3rd Cir.) 18
Seabord Air Line Ry. v. Padgett, 236 U. S. 668..... 8
Shanks v. D. L. and W. R. R. Co., 239 U. S. 556, 558.. 9
Shapiro v. United States, 335 U. S. 1, 16..... 11
South Chicago Coal Co. v. Bassett, 309 U. S. 251, 258, 260 18
So. Pac. Co. v. Ind. Acc. Com., 251 U. S. 259, 263..... 9
Southern R. Co. v. Lloyd, 239 U. S. 496..... 8
Swanson v. Marra Bros., 328 U. S. 1.....9, 12
Taylor v. McManigal, 89 F. 2d 583 (6th Cir.).....12, 13
Thames Towboat Co. v. The Francis McDonald, 254 U. S. 242 13
The Arizona v. Anelich, 298 U. S. 110, 123..... 9
The Steamship Jefferson, 215 U. S. 130, 142, 143..... 14
Tiller v. Atlantic Coast Line R. Co., 318 U. S. 54..... 19
United States v. Lindgren, 28 F. 2d 725 (4th Cir.), affirmed 281 U. S. 38.....14, 15
Urie v. Thompson, 337 U. S. 163..... 19
Warner v. Goltra, 293 U. S. 155..... 9
Weaver v. Pittsburgh Steamship Co., 153 F. 2d 597 (6th Cir.), cert. den. 328 U. S. 858..... 15
Wilkerson v. McCarthy, 336 U. S. 53, 71..... 19

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

ANNA DESPER, Administratrix of the Estate of THOMAS J. DESPER, JR., Deceased,

Petitioner,

vs.

STARVED ROCK FERRY COMPANY, a corporation,

Respondent.

No.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Supreme Court of the United States:

The petitioner, Anna Desper, administratrix of the estate of Thomas J. Desper, Jr., deceased, respectfully petitions this Honorable Court as follows:

1. To review the judgment of the Court of Appeals for the Seventh Circuit in the above case, which judgment was entered on March 20, 1951 (R. 283), and became final upon the denial by that court of petitioner's application for a rehearing on May 14, 1951 (R. 286).

2. For a Writ of Certiorari to the Court of Appeals for the Seventh Circuit, for that purpose.

In this behalf, petitioner shows:

I.

Opinion Below.

The opinion of the Court of Appeals is reported in 188 F. 2d 177; it will also be found at R. 274-282, and is attached as an appendix to this petition.

II.

Jurisdictional Statement.

This Court's jurisdiction is invoked under 62 Stat. 928, 28 U. S. C. A. Sec. 1254. The judgment is a decision as to rights claimed by petitioner under the Jones Act, 41 Stat. 1007, 46 U. S. C. A. Sec. 688.

III.

The Questions Presented.

1. May an administratrix (decedent's mother in the instant case) maintain an action under the Jones Act for the death of her intestate who was killed while engaged in the course of his employment in fitting out, for use in navigation, boats which he had been hired to operate during the ensuing season and which had been at the time of the accident in question definitely assigned for such use?

2. Does the Jones Act, the relevant part of which provides:

> "any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common law right or remedy in cases of personal injury to railway employees shall apply. * * *."

extend to seamen injured in the course of their employment the principles of recovery established for railway employees, as interpreted by this Court, under the original Federal Employers' Liability Act, and under that Act as amended in 1939?

3. Does the 1939 Amendment of the Federal Employers' Liability Act, which grants to railroad employees the benefits of that Act if any part of their duties "shall be the furtherance of interstate or foreign commerce; or shall in any way directly or closely and substantially, affect such commerce * * *" confer a corresponding benefit on seamen who suffer injury in the course of their employment if any part of their employment "shall be the furtherance of" navigation "or shall in any way directly or closely and substantially affect such" navigation?

4. If the principles of recovery established for railway employees under the F.E.L.A. and under that Act as amended have been extended to seamen under the Jones Act and if, as this Court has consistently and uniformly held throughout the years, railway employees while preparing engines, trains and cars for use in interstate commerce come within the purview of that statute, on what basis may the Court of Appeals hold that the plaintiff's intestate, who was hired as a licensed navigator, while engaged in the course of his employment in preparing the boats which he had been hired to operate and which had been definitely assigned for such use, was without the scope of the Jones Act?

5. Is there any evidence to support the jury's verdict that plaintiff's intestate was a seaman within the meaning of the Jones Act?

6. Since this Court has decided that:

The principles of recovery established for railway employees under the F.E.L.A. have been extended to seamen under the Jones Act;

The policy of liberal construction of the Jones Act has been consistently maintained by this Court both before and since the passage of the Longshoremen's Act;

The construction of the Longshoremen's Act by this Court leaves unaffected the rights of members of the crew of a vessel to recover under the Jones Act when injured while pursuing their maritime employment whether on board or on shore;

There is nothing in the legislative history of the Jones Act to show that the words "in the course of his employment" do not mean what they say or that they were to be restricted to injuries occurring on navigable waters, may the Court of Appeals properly hold that the plaintiff's decedent in the instant case who came to his death while engaged in fitting out the vessels which he had been hired to operate and which had been definitely assigned for use in navigation, was without the scope or purview of the Jones Act?

Statutes Involved.

The Jones Act, 41 Stat. 1007, 46 U. S. C. A. Sec. 688, provides:

> "That any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable * * *."

The 1939 amendment of the Federal Employers' Liability Act, 53 Stat. 1404; 45 U. S. C. A. Sec. 51, provides:

> "Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of

interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this Act, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this Act and of an Act entitled 'An Act relating to the liability of common carriers by railroad to their employees in certain cases' (approved April 22, 1908), as the same has been or may hereafter be amended."

IV.

Summary and Short Statement of the Matter Involved.

This is an action under the Jones Act, 41 Stat. 1007, 46 U. S. C. A. Sec. 688, to recover for the wrongful death of plaintiff's intestate, her son, who was killed April 26, 1948, by an explosion of a fire extinguisher, while engaged, in the course of his employment by the defendant, in preparing the latter's sightseeing vessels for use during the summer season of 1948. There was a verdict for plaintiff for $25,000, upon which the District Court entered judgment. The Court of Appeals reversed and remanded with directions to enter judgment for the defendant, on the ground that decedent was not a seaman within the meaning of the Jones Act, at the time of his death, because the defendant's vessels were not then engaged in navigation. It was held, also, that the 1939 amendment of the Federal Employers' Liability Act was inapplicable in determining decedent's status as a seaman, and that the trial court's instructions reflecting the contrary view were erroneous. As the defendant's negligence is undisputed, the only ultimate question is whether decedent was a seaman within the meaning of the Jones Act, at the time of his death, so as to entitle the administratrix, his mother, to its benefits.

We adopt the following statement of the Court of Appeals (R. 274, 275, Opinion pp. 1, 2):

"Defendant is an Illinois corporation engaged in the operation of sight-seeing motor-boats on the Illinois River in the vicinity of Starved Rock. Plaintiff's intestate was first employed by defendant in April, 1947. He assisted in the preparation of the latter's motor launches and barges for the summer season, which extended from June 1 to the end of October, and, after procuring, on June 17, 1947, a Department of Commerce license 'to operate or navigate motor boats carrying passengers for hire', served as an operator of defendant's launches for the balance of the 1947 season. Defendant had five such vessels, manned by licensed crewmen and operated pursuant to Coast Guard regulations. At the close of the season, Desper helped take the boats and barges off the river and prepare them for the winter. The barges, none of which had any motive power, were floated into a shallow inlet known as Edwards Run, which was utilized by defendant as winter quarters, and there anchored to the bank; the motor launches were taken out of the water and blocked up on marine tracks on land adjacent thereto. This work was completed and Desper's employment terminated on December 19, 1947.

On March 15, 1948, Desper again entered defendant's employment. Although there was testimony to the effect that he was hired for the season and was to be employed as an operator once the boats were in the water, the work he actually performed from the date of his re-employment until his death consisted of cleaning, painting, varnishing and water-proofing the vessels and engaging in various other related activities necessarily involved in readying them for the summer season. On April 26, the date on which the accident occurred, the launches were still blocked up on rails and the barges lying in Edwards Run."

The following additional facts are relevant. It was the usual practice of the defendant to reengage the operators employed during the preceding season (R. 119) and to have them help get the boats ready for navigation (R. 115, 116). Desper was paid at the same rate for fitting out the boats as he was for operating them (R. 117-119, 123, 179). Seamen operating boats of this kind on the Illinois River never

worked under seamen's articles (R. 135) or ship's discipline, nor did they live on the boats. The fitting out work was almost finished at the time of the accident (R. 63, 64, 91) and although the work was interrupted for almost a week (R. 75) the boats were launched and running within a week or ten days after Desper was killed (R. 181). The 1948 season began May 9 (R. 181) several weeks earlier than the preceding year. (Plaintiff's Exhibit 1, R. 219, a photograph looking northeast, shows the physical conditions substantially as they existed at the time of the accident, R. 58).

Although it is immaterial, in view of *O'Donnell* v. *Great Lakes Co.*, 318 U. S. 36, whether the accident occurred on navigable waters, there was evidence that Edwards' Run was navigable (R. 78, 79). Consumers' Run, into which the marine track led, was navigable (R. 53, 100, 114).

The Workmen's Compensation proceedings before the Industrial Commission of Illinois, while entirely immaterial to the issues, were initiated by the defendant in an attempt to compel plaintiff to accept compensation under the state Workmen's Compensation Act. The plaintiff, later, after the commencement of the present suit, also filed an application for compensation, as a precautionary measure to preserve her rights. Prior to the date set for hearing we filed a written motion before the Commission, supported by affidavit, to have the hearing continued until the plaintiff's right to maintain her suit under the Jones Act had been determined in the Federal Courts. Plaintiff's motion was denied and she was compelled, at the defendant's behest, to proceed with her evidence before the Industrial Commission. There has been no final award of compensation, and plaintiff's petition for review of the arbitrator's finding, alleging the Commission is without jurisdiction, is pending. Plaintiff's right to pursue her remedy under the Jones Act in the federal courts is not affected by pending compensation proceedings. *Marceau* v. *Great Lakes*

Transit Corp., 146 F. 2d 416, 418 (2d Cir.) cert. den. 324 U. S. 872. *Davis* v. *Department of Labor*, 317 U. S. 249 (construction worker dismantling abandoned bridge), *Bethlehem Steel Co.* v. *Moores*, 335 U. S. 874, and *Baskin* v. *Industrial Accident Commission*, 338 U. S. 854 (shipyard workers repairing completed vessels) relied on by the defendant in the Court below to support its argument that the District Court should have stayed its proceedings, were all cases in which the injured workman or his widow sought workmen's compensation and there was no federal suit under the Jones Act. The state jurisdiction was upheld under the so-called doctrine of local concern. None of the employees in these cases was hired or served as a member of a crew in any capacity, and they are not authority for any purpose in the instant case.

V.

Reasons Relied On for the Allowance of the Writ.

This decision results in denying to seamen injured during the fitting out period, or to their dependents if they are killed, the benefits of the Jones Act which it was the obvious intention of Congress to apply to as large a group of seamen (longshoremen and harbor workers excepted) as was constitutionally possible. The Court of Appeals not only substituted judicial for jury determination of the fact question of who is a seaman within the meaning of the Jones Act, by narrowly construing the term navigation, but also failed to apply the principles of recovery in analogous F.E.L.A. cases under which the benefits of that Act have always been accorded to railway employees engaged in the comparable work of preparing engines, trains and cars for use in interstate commerce. See *Chicago and N. W. R. Co.* v. *Bower*, 241 U. S. 470; *Southern R. Co.* v. *Lloyd*, 239 U. S. 496; *New York Cent. and H. R. R. Co.* v. *Carr*, 238 U. S. 260, 263; *Seaboard Air Line Ry.* v. *Padgett*,

236 U. S. 668; *Grand Trunk Western R. Co.* v. *Lindsay*, 233 U. S. 42; *Norfolk and W. R. Co.* v. *Earnest*, 229 U. S. 114.

The present decision is directly in conflict with the policy of liberal construction of the Act declared by this Court and continuously adhered to in the following cases: *International Stevedoring Co.* v. *Haverty*, 272 U. S. 50; *Jamison* v. *Encarnacion*, 281 U. S. 635; *Cortes* v. *Baltimore Insular Line*, 287 U. S. 367, 375; *Warner* v. *Goltra*, 293 U. S. 155; *The Arizona* v. *Anelich*, 298 U. S. 110, 123; *Garrett* v. *Moore-McCormack Co.*, 317 U. S. 239, 248; *O'Donnell* v. *Great Lakes Dredge and Dock Co.*, 318 U. S. 36; and *Swanson* v. *Marra Bros.*, 328 U. S. 1. The Court of Appeals has erroneously interpreted this Court's decision in the *Swanson* and *O'Donnell* cases as a retreat from the liberal position taken in the *Haverty* case.

The principle established by this Court's uniform construction of the F.E.L.A., applied in the admiralty setting, confers the benefits of the Jones Act on seamen, hired as members of a crew, whose work at the time of injury is so closely related to navigation as to be practically a part of it.

The word "employment" as used in the F.E.L.A. had been construed by this Court long before the Jones Act was passed, and, of course, even longer before the 1939 amendment to the F.E.L.A. In *Shanks* v. *D. L. and W. R. R.*, 239 U. S. 556, 558, it was held that "the true test of employment in such commerce in the sense intended is, was the employee at the time of the injury engaged in interstate transportation or in work so closely related to it as to be practically a part of it." This rule was adhered to in *So. Pac. Co.* v. *Ind. Acc. Com.*, 251 U. S. 259, 263; *Ind. Com.* v. *Davis*, 259 U. S. 182, 185; *B. and O. S. W. R. R.* v. *Burtch*, 263 U. S. 540, 543. Congress must be presumed to have

used the word "employed" in the sense in which this Court had already construed it under the F.E.L.A.

Thus we find that at the time the Jones Act was passed, adopting the F.E.L.A., a uniform judicial construction of this Act required the courts, in construing it, to include within its purview not only those employees whose tasks were actually interstate, but also those whose tasks were so closely allied to such commerce as to be a part thereof. It must be presumed that Congress was aware of this rule of construction, and in adopting the statute adopted the rules of construction as well. That the construction was in fact adopted becomes apparent, we think, from the decisions hereafter cited, where the benefits of the Jones Act were extended to seamen who were working on a vessel in dry dock.

The determination of the relationship between the work a railroad employee was doing and interstate commerce was one of the principles of recovery already established for railroad employees which was to be applied in the new admiralty setting.

In *Overstreet* v. *North Shore Corp.*, 318 U. S. 125, the question was whether persons maintaining a toll bridge were "engaged in commerce" within the meaning of the Fair Labor Standards Act. The court there referred to the numerous decisions construing the F.E.L.A., and held that the test evolved in those cases, i.e., whether "the work of keeping such instrumentalities in a proper state of repair while thus used is so closely related to such commerce as to be in practice and in legal contemplation a part of it," should be applied, and should govern the interpretation of the Fair Labor Standards Act. In discussing the contention that the F.E.L.A. and the Fair Labor Standards Act were not related, and therefore the construction of one was not applicable to the other, the court said, pp. 131, 132:

> "The Federal Employers' Liability Act and the Fair Labor Standards Act are not strictly analogous, but they are similar. Both are aimed at protecting commerce from injury through adjustment of the master-servant relationship, the one by liberalizing the common law rules pertaining to negligence and the other by eliminating sub-standard working conditions. We see no persuasive reason why the scope of employed or engaged 'in commerce' laid down in the *Pederson* and related cases, cited above, should not be applied to the similar language in the Fair Labor Standards Act, especially when Congress in adopting the phrase 'engaged in commerce' had those Federal Employers' Liability Act cases brought to its attention."

Every consideration which this Court relied on in the *Overstreet* case is present, with even greater force and applicability, in our case. Not only did Congress have the decisions construing the F.E.L.A. brought to its attention when it passed the Jones Act, but by adopting that Act it adopted the settled judicial construction of it.

The F.E.L.A. used the language "employed * * * in such commerce." The Jones Act speaks of the "course of his employment." Obviously, Congress was legislating concerning "employment" in each case, and therefore the earlier decisions construing the word must be presumed to be adopted in the later Act.

In adopting an earlier act, either expressly or by implication, "Congress must be considered to have adopted also the construction given by this Court to such language, and made it a part of the enactment." *Shapiro* v. *United States*, 335 U. S. 1, 16.

The applicable principle is that work so closely related to the basic employment as to be practically a part of it entitles the employee to the benefits of the Act. In the one case it is employment in interstate commerce, in the other employment as a seaman. The principle is as readily applicable in the one case as the other. It was the duty

of the Court of Appeals to apply it in this case. *O'Donnell* v. *Great Lakes Dredge and Dock Co.*, 318 U. S. 36.

The cases cited by the Court of Appeals do not support its conclusion that decedent was not a seaman.

The Court cites *O'Donnell* v. *Great Lakes Co.*, 318 U. S. 36; *Swanson* v. *Marra Bros.*, 328 U. S. 1; *Frankel* v. *Bethlehem-Fairfield Shipyard, Inc.*, 46 F. S. 242, 249, affirmed 132 F. 2d 634 (4th Cir.) cert. denied 319 U. S. 746; *Hawn* v. *American S. S. Co.*, 107 F. 2d 999 (2d Cir.); *Antus* v. *Interocean S. S. Co.*, 108 F. 2d 185, 187 (6th Cir.); and *Taylor* v. *McManigal*, 89 F. 2d 583 (6th Cir.) in support of its conclusion that decedent was not engaged in maritime service and was not a member of a crew at the time of his death. None of these cases involves a situation in which a licensed navigator, definitely hired to operate boats, was injured while engaged in the necessary preparatory work of getting them ready for operation. There is no adjudicated case, so far as we can determine, denying a right of recovery under such circumstances.

We submit the Court of Appeals misinterpreted the *O'Donnell* and *Swanson* cases in construing them to require that a ship be engaged in navigation to give the injured employee status as a member of a crew. This Court stated in the *O'Donnell* case (Opin. pp. 42-43) that the admiralty jurisdiction of a Jones Act suit depends on the nature of the service and its relation to the operation of a vessel plying in navigable waters. This Court also said, p. 39: "There is nothing in the legislative history of the Jones Act to indicate that its words 'in the course of his employment' do not mean what they say or that they were intended to be restricted to injuries occurring on navigable waters." The test in determining the applicability of the Jones Act is the nature of the service the seaman is engaging in at the time of his injury, not the location of the vessel

nor the place where the injury occurred. This Court surely did not intend to hold, in the light of the quoted statement, that the vessel must be plying in navigable waters or actually engaged in navigation at the time of the injury. If the service is performed by a seaman hired as a member of a crew, and is necessary to the operation of the vessel, it is within the admiralty jurisdiction. The right to the benefits of the Jones Act does not depend on whether the ship is technically in navigation, but on whether the seaman is a member of its crew and his service is of a maritime nature.

Frankel v. *Bethlehem-Fairfield Shipyard, Inc.*, 46 F. S. 242, 249, affirmed 132 F. 2d 634 (4th Cir.) involved an injury to a shipyard employee engaged in new construction, which this Court has always declared to be non-maritime. *Thames Towboat Co.* v. *The Francis McDonald*, 254 U. S. 242. In *Hawn* v. *American S. S. Co.*, 107 F. 2d 999 (2d Cir.) the ship had been out of commission a year, with no prospect of being returned to service (compare *Gonzales* v. *U. S. Emergency Fleet Corp.*, 3 F. 2d 168, 170, E. D. N. Y.) and plaintiff was a day laborer helping to load her for storage purposes. *Antus* v. *Interocean S. S. Co.*, 108 F. 2d 185, 187 (6th Cir.) involved an injury to an employee who was helping to lay up the ship at the close of the navigation season. The Court implied that if the work had been done in preparation for navigation a recovery would have been allowed under the Jones Act. In *Taylor* v. *McManigal*, 89 F. 2d 583 (6th Cir.) the employee was killed while helping to fit out a Great Lakes steamer for navigation. An award of compensation under the Longshoremen's Act was upheld on the ground that the decedent was not a member of the crew because the crew had not yet been chosen at the time of his death. This is in contrast with the instant case, in which decedent was definitely hired as a crew member at the beginning of his employment. The minor factors that

decedent was not working under articles or ship's discipline, or living on board, are not significant, since river-boat operators did not customarily do so. *Daffin* v. *Pape*, 170 F. 2d 622, 625 (5th Cir.).

Decedent's Work Was Clearly Maritime.

A contract to repair a ship is a maritime contract, whether the repairs are made while she is afloat, in dry dock, or on land, *North Pac. S. S. Co.* v. *Hall Bros.*, 249 U. S. 119, 128. *The Steamship Jefferson*, 215 U. S. 130, 142, 143. The service is maritime because of its direct and intimate connection with navigation and commerce. *John Baizley Iron Works* v. *Span*, 281 U. S. 222, 232. It has such connection even though the vessel is laid up a long time and the repairs are extensive. *New Bedford Dry Dock Co.* v. *Purdy*, 258 U. S. 96. And see also, *Hillcone S. S. Co.* v. *Steffen*, 136 F. 2d 965 (9th Cir.). They are maritime if there is a present intention to put the ship in service and the work is directed to that end. See *Carumbo* v. *Cape Cod S. S. Co.*, 123 F. 2d 991, 995 (1st Cir.). It is otherwise when a ship is permanently laid up and intended to be scrapped. *Gonzales* v. *United States Emergency Fleet Corp.*, 3 F. 2d 168, 170 (E. D. N. Y.). Whether the ship be regarded as in or out of navigation during the period of repairs or reconditioning is unimportant as long as the service is maritime. The work decedent was performing on defendant's vessels at the time of his death was not only directly in aid and furtherance of navigation but was an essential prerequisite to their use in navigation and without which they could not be safely operated.

The decision of the Court of Appeals is in conflict with Hunt v. United States, 17 F. S. 578, 91 F. 2d 1014 (2d Cir.), cert. denied 302 U. S. 752; Jones v. Shepherd, 20 F. S. 345 (S. D. Miss.); United States v. Lindgren, 28 F. 2d 725 (4th Cir.), affirmed 281 U. S. 38; Daffin v. Pape, 170 F. 2d 622

(5th Cir.); and Weaver v. Pittsburgh Steamship Co., 153 F. 2d 597 (6th Cir.), cert. denied 328 U. S. 858.

In *Hunt* v. *United States*, 17 F. S. 578, 91 F. 2d 1014 (2d Cir.), cert. denied 302 U. S. 752, the employee was injured while cleaning and scraping a ship in drydock. He had signed no shipping articles, but took his chances on being selected as one of the crew when the ship should be ready to begin her next voyage. A recovery under the Jones Act was allowed. In *United States* v. *Lindgren*, 28 F. 2d 725, 728 (4th Cir.), affirmed 281 U. S. 38, the decedent, who had been hired as third mate, was killed while helping to repair the ship, which was in drydock in preparation for her next voyage. The Court of Appeals held there was no doubt he was a member of the crew and a recovery under the Jones Act would have been sustained if proof of dependency could have been made.

In *Jones* v. *Shepherd*, 20 F. S. 345, 346 (S. D. Miss.) the decedent was drowned while helping to load coal onto a vessel preparatory to a voyage. The ship had been laid up over a month, during which he lived at home, but before that he had been a member of the crew, and it was held that when he returned and engaged in the preparatory work it was a reasonable inference that he immediately became a member of the crew in the same capacity and at the same rate of pay and in the performance of the same kind of duties he had theretofore been performing.

In *Daffin* v. *Pape*, 170 F. 2d 622 (5th Cir.), decedent, carried on the payroll of defendant's radio station as handyman and porter, killed while preparing defendant's yacht for a trip on which he was to be carried along to cook, serve drinks, do general work and relieve the captain at the helm, was held as a matter of law to be a member of the crew.

Weaver v. *Pittsburgh Steamship Co.*, 153 F. 2d 597 (6th Cir.), cert. denied 328 U. S. 858, was an action for overtime

compensation under the Fair Labor Standards Act. The plaintiff had worked under signed shipping articles as a fireman on Great Lakes Steamships during the fit-out and sailing periods, and until the end of the lay-up period. He was held to be a seaman during the entire time. Although much stress is laid on the fact that the employee worked under articles (a matter of no significance in the instant case in view of the contrary custom), the Court also approved and followed the *Hunt, Jones* and *Lindgren* cases. We submit all of these cases are indistinguishable, in principle, from the instant case, where the work done was just as directly and intimately connected with navigation. That the boats were on a marine track rather than in drydock is not significant. *Cont. Cas. Co.* v. *Lawson*, 64 F. 2d 802 (5th Cir.); *Maryland Cas. Co.* v. *Lawson*, 101 F. 2d 732 (5th Cir.).

The 1939 amendment of the Federal Employers' Liability Act is applicable in suits under the Jones Act.

A question presented for the first time in this case, which we believe this Court should decide, is whether the 1939 amendment of the F.E.L.A. is applicable in suits under the Jones Act.

The 1939 amendment is indicative of the intent of Congress to confer and extend the right of action under the F.E.L.A. to all whose duties, at any time or place, would entitle them to come within its purview. It is also indicative of the intent of Congress to confer and extend the right of action for wrongful death created by the Jones Act to all seamen whose duties, at any time or place, would entitle them to its benefits. The Jones Act expressly incorporates all statutes of the United States conferring or regulating the right of action for death in the case of railway employes. The 1939 amendment broadens the concept of employment within the meaning of the F.E.L.A. so as to confer its benefits on a larger group of employees, and

we submit it must work a corresponding enlargement of the concept of seaman so as to include employees any part of whose duties are those of a member of a crew.

In *California* v. *Zook, et al.*, 336 U. S. 725, 728, this Court recognized the power of Congress to "redefine the areas of national and local predominance." The passage of the 1939 amendment of the F.E.L.A. was an exercise of the Congressional power in the field of the relationship of common carriers by railroad to their employees. The principle by which the area of national predominance was enlarged was that the entire scope of the employee's duties was to be considered in determining his right to the benefit of the Act. The Congressional mandate requires a corresponding enlargement of the area of national predominance in the field of the relationship of shipowners to their employees. The Jones Act is to be construed so as to enlarge, rather than restrict, admiralty's protection to its wards. *Garrett* v. *Moore-McCormack Co.*, 317 U. S. 239, 248.

The decision of the Court of Appeals holding the 1939 amendment of the F.E.L.A. inapplicable in Jones Act cases is in conflict, in principle, with *Nordquist* v. *U. S. Trust Co. of N. Y.*, 188 F. 2d 776 (2d Cir.). There the plaintiff sued the executor of a deceased shipowner, under the Jones Act, to recover for the wrongful death of plaintiff's decedent. The defendant moved to dismiss on the ground that since there was no survival provision in the Jones Act, the action abated with the death of the tort feasor. The Court of Appeals held that the provision of the F.E.L.A. (45 U. S. C. A. Sec. 57) that suit might be brought against "receivers or other persons or corporations charged with the duty of the management and operation of the business of a common carrier" was by implication a survival statute and should be read into the Jones Act so as to permit suit against the executor of a deceased shipowner. Receivers of common carriers by railroad were equated with executors of shipowners, and the principle of survival carried over into the

Jones Act. This was a more liberal application of principle than the District Court made in the instant case in giving the administratrix the benefit of the 1939 amendment of the F.E.L.A.

The Court of Appeals' refusal to apply the amendment was on the ground that it was not a statute conferring or regulating the right of action for death in the case of railway employees (Opinion p. 7). It seems clear that the amendment confers the right of action on those who would not otherwise come within its purview. But even if the amendment were not applicable to Jones Act suits, the error in applying it would be harmless since the decedent was under the Jones Act by virtue of principles well established in analogous F.E.L.A. cases before its passage.

The Court of Appeals has substituted its judgment for that of the jury on the fact question of whether decedent was a seaman within the meaning of the Jones Act at the time of his death.

While the *O'Donnell* and *Swanson* cases have confined the benefits of the Jones Act to seamen who are members of a crew, this Court recognized in *South Chicago Coal Co. v. Bassett,* 309 U. S. 251, 258, 260, that the term "crew" does not have an unvarying legal significance, and that whether one is a member of a crew is a question of fact depending on all the circumstances. The term was interpreted broadly in *Norton* v. *Warner Co.,* 321 U. S. 565, and in *Cantey* v. *McLain Line,* 312 U. S. 667, reversing 32 F. S. 1023, 114 F. 2d 1017, on the authority of the *Bassett* case. The question has been held to be one of fact requiring an affirmance of a jury's finding if there is any evidence to support it, in *Gahagan Const. Corp.* v. *Armao,* 165 F. 2d 301, 305, 307 (1st Cir.), cert. den. 333 U. S. 876; *Bowen* v. *Shamrock Towing Co.,* 139 F. 2d 674 (2d Cir.); and *Schantz* v. *American Dredging Co.,* 138 F. 2d 534 (3rd Cir.).

This Court's decisions restoring the historic role of the jury in passing on disputed questions of fact and in drawing inferences from proven facts in F.E.L.A. cases require that the verdict of the jury and the judgment of the District Court be sustained in the instant case. See *Wilkerson* v. *McCarthy*, 336 U. S. 53, 71; *Lilly* v. *Grand Trunk Western R. Co.*, 317 U. S. 481; *Tiller* v. *Atlantic Coast Line R. Co.*, 318 U. S. 54; *Bailey* v. *Central Vt. Ry. Co.*, 319 U. S. 350; *Lavender* v. *Kurn*, 327 U. S. 645; *Ellis* v. *U. P. R. Co.*, 329 U. S. 649; *Urie* v. *Thompson*, 337 U. S. 163.

We submit that since the Jones Act, even if strictly construed, expressly grants to seamen the same common law remedy to recover for personal injury suffered in the course of their employment, as that given to railway employees under the provisions of the F.E.L.A., as amended in 1939, the right of recovery of such employees if any part of their employment is in interstate commerce, must likewise be similarly construed and rendered applicable to seamen, any part of whose duties is in furtherance of navigation; to hold otherwise would nullify the Congressional mandate.

The words "vessel plying in navigable waters", which the Court of Appeals lifts out of their context in the *Swanson* case, must be construed in the light of the question there being decided, and the decisions in other cases. Certainly the court did not mean to imply that a vessel must actually be plying in navigable waters at the very instant of the accident. Such a construction would exclude a number of cases which arise in harbor, and in which recovery has been uniformly sustained.

The statement by the Court of Appeals (Opinion p. 6) that this Court "has retreated from the position taken in the *Haverty* case and has narrowed the Jones Act concept of 'seaman' to the point where it includes only one who is a member of the crew of a vessel plying in navigable

waters" * * * or (Opinion p. 8) "a vessel which was engaged in navigation as distinguished from one which had been withdrawn from navigation" is quite misleading to say the least. As heretofore pointed out, this Court has consistently adhered to the position taken in the *Haverty* case. Congress, by the enactment of the Longshoremen's Act, excluded from the purview of the Jones Act a class of employees which had previously been allowed to participate in its benefits and left unaffected the rights of other seamen to recover under the Jones Act for injuries suffered while engaged in the course of their maritime employment. *Swanson* v. *Marra*, 328 U. S. 1. The nature of decedent's employment and "its relationship to the operation of vessels plying in navigable waters" brought him squarely within the test essential to a right to recover under the Jones Act as prescribed by this Court in the *O'Donnell* and *Swanson* cases.

Conclusion.

This case raises important questions of federal law under the Jones Act which this Court has not passed upon, and certiorari should therefore be granted. *De Zon* v. *American President Lines*, 318 U. S. 660, 661. The decision of the Court of Appeals erroneously deprives plaintiff of her right of recovery under that Act. Petitioner therefore urges that the writ prayed for in the petition be issued; that the judgment of the Court of Appeals be reversed and the judgment of the District Court affirmed.

Respectfully submitted,

JOSEPH D. RYAN,
Attorney for Petitioner.

APPENDIX.

In the
United States Court of Appeals
For the Seventh Circuit

OCTOBER TERM, 1950, JANUARY SESSION, 1951.

No. 10257

ANNA DESPER, Administratrix of the Estate of THOMAS J. DESPER, JR., Deceased,
Plaintiff-Appellee,
vs.
STARVED ROCK FERRY COMPANY,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

March 20, 1951

Before KERNER, LINDLEY and SWAIM, *Circuit Judges.*

LINDLEY, *Circuit Judge.* This is an action under the Jones Act, 46 U.S.C.A., Sec. 688, for damages for the death of plaintiff's intestate, Thomas J. Desper, Jr., as a result of injuries sustained by him in the course of his employment by defendant. A jury found for plaintiff, assessing her damages at $25,000. From the judgment entered on the verdict, defendant appeals.

Defendant is an Illinois corporation engaged in the operation of sight-seeing motor-boats on the Illinois River in the vicinity of Starved Rock. Plaintiff's intestate was first employed by defendant in April, 1947. He assisted in the preparation of the latter's motor launches and barges for the summer season, which extended from June 1 to the end of October, and, after procuring, on June 17, 1947, a Department of Commerce license "to operate or navigate motor boats carrying passengers for hire", served as an operator of defendant's launches for the balance of the 1947 season. Defendant had five such vessels,

manned by licensed crewmen and operated pursuant to Coast Guard regulations. At the close of the season, Desper helped take the boats and barges off the river and prepare them for the winter. The barges, none of which had any motive power, were floated into a shallow inlet known as Edwards Run, which was utilized by defendant as winter quarters, and there anchored to the bank; the motor launches were taken out of the water and blocked up on marine tracks on land adjacent thereto. This work was completed and Desper's employment terminated on December 19, 1947.

On March 15, 1948, Desper again entered defendant's employment. Although there was testimony to the effect that he was hired for the season and was to be employed as an operator once the boats were in the water, the work he actually performed from the date of his reemployment until his death consisted of cleaning, painting, varnishing and water-proofing the vessels and engaging in various other related activities necessarily involved in readying them for the summer season. On April 26, the date on which the accident occurred, the launches were still blocked up on rails and the barges lying in Edwards Run. The largest of the latter was a houseboat in which defendant's manager had year-round living quarters and which was also used as a machine and tool shop, warehouse, ticket office and waiting room. Five or six men were on this barge, spraying life preservers which were to be used on the sight-seeing boats, and defendant's president, one Birkenbuel, was also there, working on a fire extinguisher. This extinguisher exploded, killing Birkenbuel and plaintiff's intestate.

Both plaintiff and defendant filed applications for adjustment of claim with the Industrial Commission of Illinois, the defendant on January 6, 1949, and the plaintiff on March 28, 1949, seven days after filing her complaint in the instant action in the District Court. After hearing, an arbitrator decided that the provisions of the Illinois Workmen's Compensation Act were applicable and that under Section 7 (b) thereof (Ill. Rev. Stat. 1949, Ch. 48, Sec. 144 (b)), plaintiff was entitled to compensation in the amount of $19.50 per week for 266 weeks and $13.00 for one additional week. Defendant's tender of the amount of compensation which had already accrued and its offer

to pay the balance of the award were immediately rejected by plaintiff, who filed with the commission a petition for review, alleging that the commission lacked jurisdiction and praying that the order be vacated. The pendency of this petition for review was urged by defendant in support of its motion to stay the proceedings in the instant case,—a motion predicated on its contention that the commission's decision, subject to review by the courts of Illinois, would be determinative of plaintiff's right to the relief prayed. The District Court, however, overruled the motion and the suit proceeded to judgment as related.

It is defendant's position that plaintiff's intestate, Desper, was not a "seaman" within the meaning of the Jones Act and that plaintiff, therefore, has no right to maintain an action for damages for his death in the course of his employment, but has available to her only the remedy afforded by the Illinois Workmen's Compensation statute. It is urged that the District Court erred in taking the contrary position and, more particularly, in denying defendant's motion for a stay, in refusing to direct a verdict for defendant, in giving certain instructions submitted by plaintiff and failing to give an instruction offered by defendant, and in overruling defendant's motion for judgment notwithstanding the verdict.

The Jones Act, 46 U.S.C.A. Sec. 688, provides that "Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable." Jurisdiction in such actions lies in the court of the district in which the defendant employer resides or in which his principal office is located. The language employed makes it readily apparent that the benefits of the Act are available only to (1) a "seaman" who has been injured in the course of his employment or (2) "the personal representative of such seaman", in the

event the injuries received result in his death, and that the crucial question presented on this appeal is whether Desper, the plaintiff's intestate, was a "seaman" within the meaning of the Act, so as to confer on his personal representative the right to maintain this action.[1] Both parties, however, have advanced arguments which tend to broaden this issue, defendant contending that the fatal accident occurred on non-navigable waters, apparently on the theory that this fact, if true, precludes the maintenance of plaintiff's suit under the Jones Act, and plaintiff urging that the 1939 Amendment to the Federal Employers Liability Act, 53 Stat. 1404, 45 U.S.C.A. Sec. 51, has so enlarged the meaning of the term "seaman", as used in the Jones Act, as to bring within its scope not only one who is "engaged in actual navigation" but also one who is engaged in "work so closely and substantially affecting navigation as to be a part thereof".

That it is wholly immaterial whether the fatal injury suffered by plaintiff's intestate was inflicted on navigable or non-navigable waters, is clear from the decision in *O'Donnell* v. *Great Lakes Co.*, 318 U. S. 36, in which the Supreme Court, after observing, at page 39, that "There is nothing in the legislative history of the Jones Act to indicate that its words 'in the course of his employment' do not mean what they say or that they were intended to be restricted to injuries occurring on navigable waters", concluded, at page 42: "The right of recovery in the Jones Act is given to the seaman as such, and, as in the case of maintenance and cure, the admiralty jurisdiction over the suit depends *not on the place where the injury is inflicted but on the nature of the service* and its relationship to the operation of the vessel plying in navigable waters. * * * It follows that the Jones Act, in extending a right of recovery to the seaman injured while in the service of his vessel by negligence, has done no more than supplement the remedy of maintenance and cure for injuries suffered by the seaman, *whether on land or sea*, by giving to him the indemnity which the maritime law afforded to a seaman injured in consequence of the unseaworthiness of the vessel or its tackle." (Emphasis

[1] Defendant does not deny that Desper's death resulted from injuries sustained in the course of his employment, nor does it contend that, insofar as the question of negligence is concerned, the evidence was insufficient to sustain the verdict against it.

supplied.) In this case, then, plaintiff's right to recover is dependent on the status of the decedent rather than on the situs of the injury which resulted in his death; if Desper was a "seaman" within the meaning of the Jones Act, plaintiff is entitled to maintain this action irrespective of whether his death occurred on navigable or non-navigable waters or even on dry land; if he was not such a "seaman", she is not so entitled even though his death occurred on admittedly navigable waters, but is restricted to the remedy afforded by the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C.A., Sec. 901 et seq. *Swanson* v. *Marra Brothers, Inc.*, 328 U.S. 1, 4-7.

In considering plaintiff's contention that the 1939 Amendment to the Federal Employers' Liability Act broadened the meaning of the term "seaman", as used in the Jones Act, the history of that Act and related statutes and the decisions based thereon are enlightening. The Act was passed in 1920, subsequent to the Supreme Court's determination, in *Chelentis* v. *Luckenbach Steamship Co.*, 247 U. S. 372, that Section 20 of the Seaman's Welfare Act, 38 Stat. 1152,[2] effectuated no change in the general maritime law. The Act's express provision that a seaman injured in the course of his employment might, "at his election, maintain an action for damages at law", and the incorporation therein of "all statutes of the United States conferring or regulating the right of action for death in the case of railway employees", overcame the objection, expressed by the court in the *Chelentis* case, 247 U. S. at page 384, that the earlier legislation disclosed no intention "to give the complaining party an election to determine whether the defendant's liability shall be measured by common-law standards rather than those of the maritime law", and effectively abolished the fellow-servant rule in cases where such election was exercised. In the *Haverty case, International Stevedoring Co.* v. *Haverty*, 272 U. S. 50, Congress' power to change the maritime law by making provision for such an election was recognized, and the court, in construing the act, held that, although for most purposes stevedores are not regarded as seamen, "in this statute, 'seaman' is to be taken to include stevedores employed in maritime work on navigable waters * * *."

[2] "In any suit to recover damages for any injury sustained on board vessel or in its service seamen having command shall not be held to be fellow-servants with those under their authority."

Less than a year after the decision in the *Haverty* case, Congress enacted the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C.A., Sec. 901 et seq., providing for the payment of compensation to an employee injured "upon the navigable waters of the United States," but expressly excluding from its coverage "a master or member of a crew of any vessel". In *Frankel* v. *Bethlehem-Fairfield Shipyard, Inc.*, 46 F. Supp. 242, 249, affirmed 132 F. 2nd 634, cert. denied 319 U. S. 746, the court, holding that the Longshoremen's Act "necessarily limits the scope of 'seaman' in the Jones Act to a maritime employee who can be considered the master or member of the crew of a vessel", concluded that the plaintiff in that case could not be classified as a seaman "as his duties had no direct relation to navigation". And in *Swanson* v. *Marra Brothers*, 328 U. S. 1, 7, the Supreme Court adopted the same construction, holding that "the effect * * * of the Longshoremen's Act is to confine the benefits of the Jones Act to the members of the crew of a vessel plying in navigable waters and to substitute for the right of recovery recognized by the *Haverty* case only such rights to compensation as are given by the Longshoremen's Act." This decision clearly demonstrates that, since the passage of the Longshoremen's Act, the court has retreated from the position taken in the *Haverty* case and has narrowed the Jones Act concept of "seaman" to the point where it includes only one who is a member of the crew of a vessel plying in navigable waters.

Plaintiff, however, while contending that the evidence is sufficient to establish that the decedent was a member of the crew of a vessel and, thus, in any event, a "seaman" within the meaning of the Jones Act, takes the position that the 1939 Amendment to the Federal Employers Liability Act, 53 Stat. 1404, which provides that "Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter", considered in conjunction with the Jones Act proviso that statutes "modifying or extending the common-law right or remedy in cases of personal injury to railway

employees" shall apply in actions by seamen, has so broadened the concept of "seaman" as to bring within its scope one whose work "closely and substantially" affects navigation. Plaintiff's theory is that, because any employee of a carrier whose work substantially affects interstate commerce is covered by the Federal Employers Liability Act, it follows that any employee whose work affects navigation is covered by the Jones Act. This position is, we think, unsound, for the Jones Act incorporates only those statutes "conferring or regulating the right of action for death in the case of railway employees" and the 1939 Amendment to the F. E. L. A. is not such a statute, for it is concerned only with the question of the coverage of the Act, with the determination of what "employees" are entitled to its benefits. It is, in short, nothing more than a definition of the term "employee" for the purposes of the F. E. L. A., and cannot reasonably be construed as a redefinition of the term "seaman", as used in the Jones Act.

Defendant contends that the trial court's first three instructions to the jury clearly reflect that court's adoption of the plaintiff's argument that the 1939 Amendment of the F. E. L. A., had the effect of broadening the Jones Act concept of "seaman", and that giving such instructions constituted reversible error. That defendant's contention is not without merit is best illustrated by the quotation of instruction number 1 which reads, in pertinent part:

> "If you believe * * * that a duly licensed operator operating any one of the ferry boats of the defendant * * * during the regular season for such operation, was the crew of said vessel and engaged in actual navigation or in work which was so closely and substantially affected navigation as to be a part thereof, then the court instructs you that operation of said boats by a duly licensed operator * * * would constitute said operator a seaman within the meaning of the * * * Merchant Marine Act; and the court further instructs you that under such circumstances said operator is the crew of the ferry boat.
>
> "The court further instructs you that if you believe * * * that the plaintiff's decedent * * * was employed by the defendant to operate its ferry boats as a licensed operator for the season of

> 1948, and commenced work * * * in March, 1948, aiding in the work of readying and fitting out defendant's said ferry boats * * * for operation on the Illinois River * * * and if you further find * * * that any part of the duties of * * * deceased * * * was the operation of one of said ferry boats as the crew of said vessel on navigable waters and that his work as such operator would be in actual navigation or in work which so closely and substantially affected navigation as to be a part thereof, then you should find that he was subject to the provisions of the Merchant Marine Act * * *."

Furthermore, inasmuch as this instruction is based upon that interpretation of the evidence which is most favorable to plaintiff, it presents the further question whether the court below erred, as defendant insists it did, in failing to find that such evidence was insufficient, as a matter of law, to constitute plaintiff's decedent a "seaman", and in denying defendant's motion for a directed verdict.

In *Nogueira* v. *N. Y., N. H. & H. R. Co.*, 281 U. S. 128, 136, in *Warner* v. *Goltra*, 293 U. S. 155, 159-60, and again in *South Chicago Co.* v. *Bassett*, 309 U. S. 251, 256-257, the Supreme Court has pointed out that the legislative history of the Longshoremen's and Harbor Workers' Compensation Act leads to the conclusion that the term "master or member of a crew of any vessel", as used in that Act, is synonymous with the term "seaman", as used in the Jones Act. In *Swanson* v. *Marra Brothers*, 328 U.S. 1, 7, decided in 1946, some seven years after the enactment of the F. E. L. A. Amendment on which plaintiff relies, the court not only reiterated this conclusion but went a step farther, stating that the effect of the Longshoremen's Act was to "confine the benefits of the Jones Act to the crew of a vessel *plying in navigable waters*". (Emphasis supplied.) The phrase, "plying in navigable waters", is not we believe, to be construed as meaning that the vessel must, at the very moment of the injury, have been actually in motion on navigable waters, but is, rather, to be interpreted as meaning that the person injured must have been a member of the crew of a vessel which was engaged in navigation as distinguished from one which had been withdrawn from navigation. In the case

at bar, there was no vessel so engaged; all of defendant's boats and barges had been withdrawn from navigation for the winter and laid up in winter quarters, and until such time as they should once again be placed in service, they were not engaged in navigation and plaintiff's decedent, was not, therefore, a "seaman" within the meaning of the Jones Act—*i. e.*, a master or member of the crew of a vessel engaged in navigation. *Swanson* v. *Marra Brothers*, 328 U. S. 1, 7. This conclusion finds support in the decisions rendered in *Hawn* v. *American S.S. Co.*, 107 F. 2nd 999, 1000 (CA-2), where the court, in affirming the trial court's direction of a verdict for the defendant in a case where the plaintiff was injured while employed with others in moving a vessel from one position alongside a dock to another at which it was taking on cargo for storage, stated that, although navigation "does not cease when the ship is in drydock for repairs, awaiting new business", a ship "is withdrawn from navigation, if laid up for the winter", and in *Antus* v. *Interocean S. S. Co.*, 108 F. 2nd 185, 187 (CA-6), where the court, affirming the dismissal of a suit filed under the Jones Act by one who had been a member of the ship's crew and was injured while helping prepare the vessel for winter quarters, stated: "The fact that he had been, or expected in the future to be, a seaman does not render maritime work which was not maritime in its nature." *Cf. Taylor* v. *McManigal*, 89 F. 2nd 583 (CA-6). Of the cases cited by the plaintiff, the only one which allowed a recovery under the Jones Act where the ship was not in actual navigation, *Hunt* v. *United States*, 17 F. Supp. 578, merely serves to emphasize the factors, lacking in the case at bar, which serve to make one a seaman for the purposes of the Act. In the *Hunt* case, the vessel on which the accident occurred was in drydock undergoing repairs and, thus, was not "withdrawn from navigation" as were the boats involved in the case at bar, which had been "laid up for the winter", *Hawn* v. *American S.S. Co.*, 107 F. 2nd 999, 1000 (CA-2). A second significant difference is that the plaintiff in that case was living on board the vessel and was subject to ship's discipline as a member of the crew.

In the light of the foregoing authorities, we can only conclude that plaintiff's decedent was not, at the time of his death, a "seaman" within the meaning of the Jones Act and that the trial court erred in instructing the jury

and in failing to grant defendant's motion for a directed verdict. Consequently, the judgment is reversed and the cause remanded with directions to enter judgment for defendant.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 231

ANNA DESPER, Administratrix of the Estate of THOMAS J. DESPER, JR., Deceased,

Petitioner,

vs.

STARVED ROCK FERRY COMPANY, a corporation,

Respondent.

PETITIONER'S REPLY BRIEF.

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INDEX

CITATIONS.

	PAGE
Agnew v. American President Lines, 73 F. S. 944, 951 (N. D. Cal.)	7
Antus v. Interocean Co., 108 F. 2d 185, 187 (6th Cir)	13
Arizona v. Anelich, 298 U. S. 110	18
Bowen v. Shamrock Towing Co., 139 F. 2d 674 (2d Cir.)	16
Cantey v. McLain Line, 312 U. S. 667	16
Carroll v. U. S., 133 F. 2d 690 (2d Cir.)	7
Carumbo v. Cape Cod S. S. Co., 123 F. 2d 991, 995 (1st Cir.)	8, 17
Carvalho v. Fregata, 42 F. S. 404 (D. Mass.)	15
Chisholm v. Cherokee-Seminole S. S. Corp., 36 F. S. 967, 968	18
Cont. Cas. Co. v. Lawson, 64 F. 2d 802 (5th Cir.)	7
Daffin v. Pape, 170 F. 2d 622 (5th Cir.)	14
Diomede v. Lowe, 87 F. 2d 296 (2d Cir.)	16
Frankel v. Bethlehem-Fairfield Shipyard, 46 F. S. 242, 132 F. 2d 634 (4th Cir.)	13
Gahling v. Colabee S. S. Co., 37 F. S. 759	19
Gonzales v. United States E. F. Corp., 3 F. 2d 168 (E. D. N. Y.)	9
Gonzales v. R. and F. Lee Ferry Co., 43 F. S. 366 (S. D. N. Y.)	15
Hunt v. U. S., 17 F. S. 578 (S. D. N. Y.)	3, 5, 9
In Re Pate's Estate, 106 N. Y. S. 2d 378, 381	9
International Stevedoring Co. v. Haverty, 272 U. S. 50	8
Jones v. Shepherd, 20 F. S. 345 (S. D. Miss.)	6
Knickerbocker Ice Co. v. Stewart, 253 U. S. 149	10
Long Island R. Co. v. Lowe, 145 F. 2d 516 (2d Cir.)	13, 14
Marceau v. Great Lakes Transit Corp., 146 F. 2d 416, 418 (2d Cir.)	11

Maryland Cas. Co. v. Lawson, 101 F. 2d 732 (5th Cir.) 7
Maryland Cas. Co. v. Lawson, 94 F. 2d 190, 192 (5th Cir.) 17
Massman Const. Co. v. Bassett, 30 F. S. 813 (E. D. Mo.) 13
McLeod v. Union Barge Line Co., 95 F. S. 366 (W. D. Pa.) 7
Merritt-Chapman and Scott Corp. v. Willard, 189 F. 2d 791, 792 (2d Cir.) 14
Nordquist v. U. S. Trust Co., 188 F. 2d 776 (2d Cir.) 19
Norton v. Warner Co., 321 U. S. 565, 571 4, 10, 16, 17
O'Donnell v. Great Lakes Co., 318 U. S. 36 8, 12, 22
Pac. Employers' Ins. Co. v. Pillsbury, 39 F. S. 673 (S. D. Cal.) 15
Pioneer S. S. Co. v. Backwell, 57 F. S. 650, 652 (N. D. Ind.) 15, 17
Schantz v. American Dredging Co., 138 F. 2d 534 (3rd Cir.) 15, 17
Seneca Washed Gravel Corp. v. McManigal, 65 F. 2d 779 (2d Cir.) 2, 4, 15
Smrekar v. Bay and River Nav. Co., 69 Cal. App. 2d 654, 160 P. 2d 85 15
South Chicago Coal Co. v. Bassett, 309 U. S. 251 8, 9, 13, 16
Southern Pac. Co. v. Jensen, 244 U. S. 205 10
State Industrial Commission v. Nordenholt Corp., 259 U. S. 263 13
Streeter v. Great Lakes Transit Corp., 49 F. S. 466 19
Swanson v. Marra Bros., 328 U. S. 1 8, 12
Taylor v. McManigal, 89 F. 2d 583 (6th Cir.) 2, 4
The Swiftarrow, 34 F. S. 541 19
Tucker v. Norton, 56 F. S. 61, 151 F. 2d 96 (3rd Cir.) 15
Union Oil Co. v. Pillsbury, 63 F. 2d 925 5
United States v. Lindgren, 28 F. 2d 725, 728 (4th Cir.) 5
Walling v. Bay State, etc. Co., 149 F. 2d 346, 349, 351 (1st Cir.) 15

Weaver v. Pittsburgh Steamship Co., 153 F. 2d 597 (6th Cir.) 1
Wheeler Shipyard v. Lowe, 13 F. S. 863, 82 F. 2d 1022 (2d Cir.) 14, 15
Wm. Spencer and Son Corp. v. Lowe, 152 F. 2d 847 (2d Cir.) 14

STATUTES.

The Jones Act, 41 Stat. 1007; 46 U. S. C. A. 688 22
The Longshoremen's Act, 33 U. S. C. A. Sec. 903 23

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 231

ANNA DESPER, Administratrix of the Estate of THOMAS J. DESPER, JR., Deceased,

Petitioner,

vs.

STARVED ROCK FERRY COMPANY, a corporation,

Respondent.

PETITIONER'S REPLY BRIEF.

It is not essential to status as a member of a crew that a ship be in navigation.

No reasons were suggested by the Court of Appeals, and none have been suggested by respondent, why navigation is essential to status as a member of a crew. Neither the Court nor respondent has commented on the decision in *Weaver* v. *Pittsburgh Steamship Co.*, 153 F. 2d 597 (6th Cir.), cert. den. 328 U. S. 858, that the employee was a seaman during the fitting out period, although the ship had been laid up for the winter and was just as much "with-

drawn from navigation" as were the boats in the instant case. Although the *Weaver* case was an action under the Fair Labor Standards Act, the controlling question whether the employee was a seaman was determined by reference to Jones Act cases.

Neither the Court of Appeals nor respondent has mentioned that in *Taylor* v. *McManigal*, 89 F. 2d 583 (6th Cir.), a proceeding under the Longshoremen's Act, the decision that the weight of the evidence supported the finding that the employee was not a member of a crew was on the ground that the crew had not been chosen at the time of his death, which occurred during the fitting out period after the ship had been laid up all winter. There was not the slightest intimation by the Court that a ship in navigation was a prerequisite to status as a member of a crew. There was some evidence that the employee was hired for the season as assistant engineer, and it seems apparent that if suit had been brought under the Jones Act, it would at least have been a question for the jury whether the employee was a member of the crew.

Respondent also ignores *Seneca Washed Gravel Corp.* v. *McManigal*, 65 F. 2d 779 (2d Cir.), another proceeding under the Longshoremen's Act, where, although a passing reference was made to the ship's being withdrawn from navigation, the entire emphasis of the decision was on the complete absence of navigational duties considering the year-round employment, and the clear import of the decision is that such duties would have made the employee a crew member even if the ship were not in navigation. These cases are squarely in conflict with the instant decision holding navigation to be a prerequisite.

Even if navigation were essential, the cases cited at pages 14 and 15 of the petition show that petitioner's proof met this requirement.

Respondent attempts to distinguish *Hunt* v. *United States*, 17 F. S. 578 (S. D. N. Y.) on the ground that Hunt slept and ate on the boat and was subject to ship's discipline; that he was admittedly a seaman and the vessel "was tied up awaiting its next voyage" (Brief, p. 26). Decedent, a licensed operator, was unquestionably a seaman too. Hunt's status as a crew member was as much in issue as decedent's. Respondent is in error in asserting that the vessel in the *Hunt* case was tied up awaiting her next voyage. She had been in drydock a week, undergoing repairs, at the time of the accident, remained in drydock nine weeks thereafter, and it did not appear how long after that she took on cargo and began her next voyage. She was in every real sense farther withdrawn from navigation than the boats in the instant case. No effort is made by respondent to show why the vessel in the *Hunt* case should be regarded as in navigation, and the boats in the instant case held as a matter of law to be withdrawn. This is the vital point of conflict between the two cases, and respondent ignores it.

It is no answer to say that Hunt was under ship's discipline and lived on the boat, while decedent lived at home, was not under discipline, and there were no ship's officers under whose command he acted. The absence of these secondary factors is wholly irrelevant, and can only be significant where they were invariably, or at least customarily present when the employee was a crew member. There was not a scintilla of evidence that any of these factors obtained during the season, when decedent and the other licensed operators were running the boats, when,

even respondent must agree, they were under the Jones Act. Respondent concedes that riverboat operators never worked under shipping articles, but it is claimed there is no support in the record for our statement that they never worked under ship's discipline or lived on the boats. We feel confident that if there had been any such practice or custom (which in any event is wholly immaterial) it would have been made to appear during the trial. Decedent was the captain and crew of whatever boat he was operating. *Norton* v. *Warner Co.*, 321 U. S. 565, 571. His status as such was entirely unaffected by the fact that he went home at the end of his day's work.

References to cases in which it is stated that no crew was aboard, or organized, and no ship's discipline being enforced, are wholly irrelevant in the present context. Whether or not the other operators had been hired at the time of decedent's death is likewise without significance, since, if the accident had not occurred and none of the other crew members had been hired when the sightseeing trips were due to begin, operations could have been carried on by decedent and respondent's manager who also acted as pilot (R. 110). The fact that respondent deferred hiring other operators until the preliminary work of fitting out the boats had been completed has no possible bearing on the issues involved herein.

The attempt to place controlling significance on the absence of these minor factors cannot obscure the fact of conflict of the instant case with those cited at pages 14 and 15 of the petition, and with *Taylor* v. *McManigal*, 89 F. 2d 583 (6th Cir.) and *Seneca Washed Gravel Co.* v. *McManigal*, 65 F. 2d 779 (2d Cir.). Such attempt is equivalent to saying that if these secondary factors or some of them are present the ship need not be in navigation—a position directly opposed to that taken by respondent at pages 21-24 of its brief.

Respondent argues at brief pages 23, 24, that where a ship is temporarily out of service she may be regarded as still in navigation if her crew is kept intact and ship's discipline observed, but if she is laid up any length of time and her crew dispersed, she is withdrawn from navigation. (*Union Oil Co.* v. *Pillsbury*, 63 F. 2d 925, cited at page 24, does not deal with this question.)

But in *Hunt* v. *United States*, 17 F. S. 578 (S. D. N. Y.) the vessel was in drydock for ten weeks and her crew were not kept intact, but she was not considered to be withdrawn from navigation. Likewise in *U. S.* v. *Lindgren*, 28 F. 2d 725, 728 (4th Cir.) where the ship had been laid up for an undisclosed period and then taken to drydock for repairs, and the crew were hired during the course of this work, and decedent, employed as third officer, came aboard for the first time the morning of his death. There is no distinction between the status of the ship in the *Lindgren* case and respondent's vessels in the instant case, except that the latter may well have been closer to actual navigation.

The Court of Appeals and respondent attempt to distinguish between a ship in drydock, which they say is still in navigation, and one which is laid up for the winter, which they declare to be withdrawn. The rationale of such distinction is not given, and we respectfully suggest that a reasonable interpretation of the Jones Act does not permit the denial of its protection by the rigid and invariable application of the rule that a ship laid up for the winter is withdrawn from navigation. It may be that during the winter season, before the work of preparation for the coming season has begun, a ship may be regarded as withdrawn from navigation, but the fitting out period, when the work essential to navigation is being done in considerable part by seamen hired as crew members, can more

naturally and properly be thought of as a part of the navigation period, clearly to be distinguished from the dormant winter season.

Respondent attempts to distinguish *Jones* v. *Shepherd*, 20 F. S. 345 (S. D. Miss.) on the ground that the decedent there was recalled as a member of the crew of the ship, which had been out of service for more than a month, and was doing the work of a roustabout, which he had done as a crew member. But decedent in the present case was also recalled as a crew member and was doing the fitting out work which not only was absolutely essential before the boats could be operated, but which defendant's crew members customarily did. The statement, at page 27 of respondent's brief, that he was hired to do general labor is directly in conflict with the evidence that he was employed for the season for the dominant purpose of operating respondent's boats. The attempt to label the decedent as one of a mere gang of shore workers (brief, p. 24) is wholly unwarranted in view of the evidence in this case. He cannot be placed in the category of the other men, mentioned at page 2 of respondent's brief, who were mere laborers doing part of the fitting out work, but were not hired as seamen, and were to be discharged as soon as their work was finished (R. 113).

It is asserted repeatedly in respondent's brief that decedent was paid by the hour, and this is urged as an important factor militating against his status as a crew member. Just as in the matter of living off the boat and not being subject to ship's discipline, there is no evidence in the record that riverboat operators were invariably or customarily paid on any other basis. The important fact, which respondent cannot dispute, is that Desper's rate of pay was the same throughout his entire employment, which proves that he had one indivisible job, rather than that he

was hired first as a boatyard worker and then later hired as a crew member.

Respondent places much emphasis on the boats' being on a marine track, on land, rather than in the water or in drydock—a wholly irrelevant factor in determining decedent's status as a seaman. Moreover, the marine track led directly into navigable water, and once ready the boats could be run into the water in a very few minutes. No essential distinction is pointed out between a drydock and a marine track, and no comment is made on the authorities (*Cont. Cas. Co.* v. *Lawson*, 64 F. 2d 802, 5th Cir.; *Maryland Cas. Co.* v. *Lawson*, 101 F. 2d 732, 5th Cir.) which hold them to be equivalent.

Respondent calls attention to what it regards as our error in referring to decedent as a licensed navigator. His license (R. 224) was to operate or navigate motor boats (we used navigate in the sense of operate) and qualified him to operate motor boats under 65 feet in length carrying passengers for hire on any navigable waters of the United States, including the ocean (R. 149). To sail or manage a vessel is to navigate it. This is the very essence of a seaman's function. That he may not have been a navigator in the sense of one skilled in determining a ship's position by the principles of geometry and astronomy is unimportant here, and does not affect his status as a seaman in the slightest degree. If stewards and chambermaids can recover under the Jones Act (*Carroll* v. *U. S.*, 133 F. 2d 690 (2d Cir.); *McLeod* v. *Union Barge Line Co.*, 95 F. S. 366, W. D. Pa.), and a barber can be held to be a seaman (*Agnew* v. *American President Lines*, 73 F. S. 944, 951, N. D. Cal.) it is hard to see why petitioner should be denied the benefits of the Jones Act as a matter of law.

The Jones Act, as interpreted by this Court, requires that the term navigation be given a broad and flexible meaning to include the fitting out period.

Assuming there is any reasonable basis for contending that seamen hired as crew members for the season, while engaged in preparing their boats for use in navigation, do not attain their status as crew members until the boats are actually placed in service—a contention, we submit, which is not in harmony with this Court's decisions in the *Haverty* (272 U. S. 50), *Bassett* (309 U. S. 251), *O'Donnell* (318 U. S. 36) and *Swanson* (328 U. S. 1) cases—still, in any event, a liberal interpretation of the Jones Act requires submission of the question of status to a jury. A jury would have the right to infer that when there is a definite present intention to place boats in operation (see *Carumbo* v. *Cape Cod S.S. Co.*, 123 F. 2d 991, 995, 1st Cir.) and the fitting out work has begun, they are sufficiently "in navigation" to give the status of crew member to those hired as such.

The Court of Appeals states (opinion page 9) that the boats would not be in navigation until they had again been "placed in service." But under this rigid rule, if sightseeing trips were scheduled to begin at noon on May 1, an operator making a test run of a boat on the morning of that date would be excluded from the benefit of the Jones Act—an obviously harsh interpretation of the Act. We submit that no precise time may be fixed, as a matter of law, at which the boats are to be deemed in service. Suppose they are in the water and can be operated, but necessary work remains to be done on their engines and hulls before they can be safely used in carrying passengers? Suppose they lack some equipment necessary to their lawful operation? And if they could still be regarded as in

service, would they be in service only from the moment they reached the water? Suppose nothing remained to be done except to move them a few feet down the runways into the water? We respectfully submit that no invariable rule can or should be declared.

This Court has recognized in *South Chicago Coal Co.* v. *Bassett*, 309 U. S. 251, that the term crew does not have an unvarying legal significance and it is equally apparent that the term navigation has no fixed meaning. There is no rule by the application of which one can say that at a given time a ship was not in navigation, but that the following day, or hour, she was. We submit that a ship can be held to be withdrawn from navigation as a matter of law only when such withdrawal is definite and permanent, as where she has been relegated to a ship's graveyard. *Hunt* v. *United States*, 17 F. S. 578, 583 (S. D. N. Y.); *Gonzales* v. *United States Emergency Fleet Corp.*, 3 F. 2d 168 (E. D. N. Y.). The jury's verdict in this case, and the judgment of the District Court, were fully supported by the evidence. In the very recent case of *In Re Pate's Estate*, 106 N. Y. S. 2d 378, 381, the Court said:

> "Recent federal cases involving the Jones Act have, in general, disclosed a tendency toward scrupulous avoidance of any possible encroachment upon the sphere of the jury in allowing recoveries."

We submit that the instant decision, encroaching upon the jury's function, is completely out of harmony with this salutary tendency.

It was not the intention of Congress that the term member of a crew should be narrowly construed to exclude seamen hired as crew members and injured while fitting out their ships, so as to place such employees under state or federal compensation acts and deny them the benefits of the Jones Act.

Congress intended, in passing the Longshoremen's Act, to provide compensation for those maritime workers who this Court had held in *Southern Pacific Co.* v. *Jensen*, 244 U. S. 205, and *Knickerbocker Ice Co.* v. *Stewart*, 253 U. S. 149 could not constitutionally be brought within state compensation acts. Seamen, however, preferred their rights under the admiralty law and the Jones Act, and at their request masters and crew members were excluded from the Longshoremen's Act. Having excluded them, Congress cannot be considered to have intended that nevertheless as many of them as possible should be brought within the federal and state compensation acts by the device of narrowly construing the term member of a crew. As this Court said in *Norton* v. *Warner*, 321 U. S. at 571:

> "But where Congress has provided that those basic rights [of seamen] shall not be withheld from a class or classes of maritime employees it is our duty on judicial review to respect the command and not permit the exemption [of a master or member of a crew from the Longshoremen's Act] to be narrowed whether by administrative construction or otherwise."

The decisions cited at page 8 of our petition, permitting awards under state compensation acts where either such acts or the Longshoremen's Act might apply did not involve employees hired as crew members, and no rights were claimed under the Jones Act in any of them. The fields covered by the Jones Act and the various compensation acts do not overlap, the Jones Act being exclusive where it

applies. Petitioner had the undoubted right to pursue her remedy under that Act in the federal courts although proceedings under the state compensation act (initiated by respondent) were pending. *Marceau* v. *Great Lakes Transit Corp.*, 146 F. 2d 416, 418 (2d Cir.), cert. den. 324 U. S. 872, which so holds, is not commented upon in respondent's brief, and our statement concerning the compensation proceedings at page 7 of the petition, is not disputed. Under such circumstances it is futile to urge that both parties have submitted to the jurisdiction of the Illinois Industrial Commission and to imply that petitioner's right to pursue her federal remedy has been foreclosed or prejudiced.

The Court of Appeals construed the Jones Act narrowly.

We respectfully submit that decedent was a member of a crew on any of three theories: (1) his work at the time of his death was so closely related to his dominant task of operating respondent's boats as to be practically part of it; (2) his main employment determined his status as a crew member during the fitting out period incidental to it; (3) the 1939 amendment of the F.E.L.A., applied in the admiralty setting, gave such status to employees any part of whose duties was that of a crew member. Whether the emphasis be on the work he was doing when he was killed, on his dominant employment, or on the 1939 amendment, the result is the same.

The Court of Appeals in construing the Jones Act ignored or refused to consider the main purpose for which decedent was hired, and the relation of his work at the time of his death to that main purpose. It considered this work in isolation, and erroneously placed him in the same category with those shore workers who had no navigational duties and were to be discharged when the fitting out work was completed. The artificial separation of decedent's

work into two mutually exclusive phases involves a narrow and unwarranted interpretation of the term seaman, as used in the Jones Act, which is in conflict with the decisions of this Court.

The test of the applicability of the Jones Act as stated in *O'Donnell* v. *Great Lakes Dredge and Dock Co.*, 318 U. S. 36, and *Swanson* v. *Marra Bros.*, 328 U. S. 1, is the relation of the services rendered to the operation of a vessel plying in navigable waters. If they bear a necessary relation to it, and are done as an incident to primary navigational duties, the Act clearly becomes applicable. No reason has been suggested why the vessel need be plying in navigable waters, or engaged in navigation, at the time the services are performed. As this Court said in the *O'Donnell* case, the remedy is given to seamen as such, and if injured in the course of their employment, they are within its purview. The repair of a vessel on dry land, as we have shown at page 14 of the petition, is maritime and within the admiralty jurisdiction, whether it be regarded as in or out of navigation.

Our position is not, as respondent asserts at page 25 of its brief, that all employees whose work is maritime are under the Jones Act. We cited this Court's decisions that repair work on vessels is maritime for the purpose of showing that it has always been regarded as having a close and intimate relation to navigation, and that admiralty jurisdiction is not dependent upon a ship's being actually in navigation. Fitting out work is, of course, indistinguishable in principle. While the maritime nature of the work does not of itself bring employees within the Jones Act, it is conclusive in the case of seamen.

It is interesting to note that the passage quoted by respondent at page 22 of its brief, and in part by the Court

of Appeals at page 9 of the opinion, from *Antus* v. *Inter-ocean S. S. Co.*, 108 F. 2d 185, 187 (6th Cir.) indicates that the Court there thought that the maritime or non-maritime nature of the work was the controlling consideration. *State Industrial Commission* v. *Nordenholt Corp.*, 259 U. S. 263; *Frankel* v. *Bethlehem-Fairfield Shipyard*, 46 F. S. 242, 132 F. 2d 634 (4th Cir.); and *Massman Const. Co.* v. *Bassett*, 30 F. S. 813, (E. D. Mo.) cited at page 24 of respondent's brief, do not support its claim that decedent's work was non-maritime. The *Frankel* and *Massman* cases involved new construction; the *Nordenholt* case did not hold that employment on a dock unloading a vessel was non-maritime, but applied the doctrine of local concern. None of the cases involved a seaman hired as such who sustained injury while fitting out his vessel for use in navigation.

The federal decisions are in conflict on the question whether the entire range of the employee's duties is to be considered in determining whether he is a member of a crew.

The Court of Appeals for the second circuit in *Long Island R. Co.* v. *Lowe*, 145 F. 2d 516, held that only the duties on the day of the accident may be considered, basing its conclusion on this Court's statement in *South Chicago Coal Co.* v. *Bassett*, 309 U. S. 251, 258, 260 that the actual duties are determinative. It seems clear that what this Court meant was that the duties the employee in fact performed, rather than the designation of his status, controlled. The captain in the *Bassett* case had included the decedent as a deckhand in making up the ship's complement, but the Court, looking at his entire employment, held his primary activities to be determinative, and found there was evidence to support the conclusion that he was not a member of the crew. Respondent falls into the same error as did the

Court of Appeals for the second circuit, at page 19 of its brief, in quoting from the *Bassett* case on this point.

It had been held in *Wheeler Shipyard* v. *Lowe*, 13 F. S. 863, 82 F. 2d 1022 (2d Cir.) that one who had been employed for five years as a shipyard worker, who was drowned during a storm while piloting a motor boat in the open ocean two miles from shore, at the employer's direction, was not a member of a crew at the time of his death because the essential nature of his employment was that of a shipyard worker. And in *Wm. Spencer and Son Corp.* v. *Lowe*, 152 F. 2d 847 (2d Cir.) the Court compared the navigational with the longshore duties of the employee's entire service in holding that he was essentially a longshoreman. In its latest expression on the subject, the Court in *Merritt-Chapman and Scott Corp.* v. *Willard*, 189 F. 2d 791, 792 (2d Cir.) said:

> "Nilsen's primary duties had to do with cargo and were such as are ordinarily performed by harbor workers. The *Bassett* case, 309 U. S. 251, 260, 60 S. Ct. 544, 84 L. Ed. 732, apparently makes primary duties the test. See also *Wm. Spencer and Son Corp.* v. *Lowe*, 2 Cir., 152 F. 2d 847, 848."

These cases cannot be reconciled with the *Long Island* case, nor with the instant decision, which is in agreement with it in principle.

The Court of Appeals for the fifth circuit, in *Daffin* v. *Pape*, 170 F. 2d 622, expressly followed *Long Island* v. *Lowe* on the point in question. (We wish to point out that the 1939 amendment of the F.E.L.A. was not called to the Court's attention in either of these cases.) But in the *Daffin* case the employee, for several months before the accident, had spent from 80 to 90 per cent of his time preparing the defendant's yacht for trips and sailing with it, and it was apparent that the Court considered that his

employment was primarily that of a member of a crew. On whatever ground the decision is based, it is in conflict with the instant decision, where decedent was doing basically the same thing—getting a boat ready for a trip—and the essential nature of his employment was that of a member of a crew.

In a number of other cases the employee's primary duties, and the essential nature of his employment considering its entire scope, determined whether he was a member of a crew. *Gonzales* v. *R. and F. Lee Ferry Co.*, 43 F. S. 366 (S.D.N.Y.); *Pioneer S. S. Co.* v. *Backwell*, 57 F. S. 650, 652 (N. D. Ind.); *Tucker* v. *Norton*, 56 F. S. 61, 151 F. 2d 96 (3rd Cir.); *Walling* v. *Bay State, etc., Co.*, 149 F. 2d 346, 349, 351 (1st Cir.); *Carvalho* v. *Fregata*, 42 F. S. 404 (D. Mass.); *Schantz* v. *American Dredging Co.*, 138 F. 2d 534 (3rd Cir.); *Smrekar* v. *Bay and River Nav. Co.*, 69 Cal. App. 2d 654, 160 P. 2d 85, cert. den: 326 U. S. 782; *Pac. Employers' Ins. Co.* v. *Pillsbury*, 39 F. S. 673 (S. D. Cal.); *Seneca Washed Gravel Corp* v. *McManigal*, 65 F. 2d 779 (2d Cir.).

It is argued at page 17 of respondent's brief that none of the cases cited by petitioner involves employment on a boat blocked up on land, and that in none were the present duties disregarded and the decision based on the main purpose of the hiring or on future duties. *Wheeler Shipyard* v. *Lowe*, 13 F. S. 863, 82 F. 2d 1022 (2d Cir.), discussed above, and *Carvalho* v. *Fregata*, 42 F. S. 404 (D. Mass.), not cited in the petition, are two cases illustrating these principles.

In the *Carvalho* case an employee hired to serve as cook aboard a vessel, which, when he was hurt, was tied at a wharf and being refitted for use in sword fishing, instead of as a dragger, was held to be a member of the crew although he had not yet performed any of his duties as

cook, but was working as a carpenter. Moreover, this ship, laid up while being converted to an entirely different use, was no closer to actual navigation than the boats in the instant case.

We submit that *Norton* v. *Warner Co.*, 321 U. S. 565, and *South Chicago Coal Co.* v. *Bassett*, 309 U. S. 251, in which all the factors are considered in an effort to ascertain the intrinsic nature of the employment, support the view that the entire range of the employee's duties is to be scrutinized in determining whether he is a crew member. Respondent's insistence that one can be a member of a crew only if he is aiding in the present movement of a vessel is not only directly contrary to the decisions of this Court but also calls for a narrow and unwarranted interpretation of the Jones Act. It is also in conflict with the liberal Congressional intent. Respondent has failed to cite a single case in which, on facts similar to those here involved, the right to maintain a Jones Act suit was denied.

Among the cases cited by respondent in support of the narrow construction urged at pages 18-21 of the brief is *Diomede* v. *Lowe*, 87 F. 2d 296 (2d Cir.), which, since *Cantey* v. *McLain Line*, 312 U. S. 667, which reversed 32 F. S. 1023, 114 F. 2d 1017, is no longer the law, as the Court recognized in *Bowen* v. *Shamrock Towing Co.*, 139 F. 2d 674 (2d Cir.).

Respondent, at page 20 of its brief, states that the principal test in determining whether an employee on board a vessel is a member of a crew is whether his services are *chiefly* in aid of navigation. This is the principal test when the question is whether he is a crew member or a longshoreman or land laborer. It is obvious that its application involves a comparison of nautical with non-nautical duties, and a consideration of the entire scope of the employment. It also emphasizes the very secondary nature of the matter

of living on or off the ship, being subject to ship's discipline, etc. Applied to decedent in this case, it clearly made him a member of a crew. The cases cited at pages 20 and 21 of respondent's brief support the view that decedent was a crew member. In one of them (*Schantz* v. *American Dredging Co.*, 138 F. 2d 534, 3rd Cir.) it was held that the evidence would permit the inference that the employee, a deckhand on a hoister, was a crew member, though he signed no shipping articles, spent six hours of an eight hour day pulling pilings and two helping maneuver the hoister, lived at home and boarded ashore, and was paid for overtime.

It would seem that membership in a crew ought to connote a fair degree of permanence, rather than a precarious status subject to change from hour to hour or day to day depending on what work the employee may be doing at the time, or whether the vessel be in or out of navigation. We think this is tacitly recognized in the cases holding that the character of the work being done at the time of the accident is not controlling, and that a crew member may retain his status as such although temporarily put to work at tasks usually performed by longshoremen. See *Maryland Cas. Co.* v. *Lawson*, 94 F. 2d 190, 192 (5th Cir.); *Carumbo* v. *Cape Co. S. S. Co.*, 123 F. 2d 991, 995 (1st Cir.); *Pioneer S. S. Co.* v. *Backwell*, 57 F. S. 650 (N. D. Ind.). And we believe it is recognized in the cases, including *Norton* v. *Warner*, 321 U. S. at 573, holding that a permanent connection with a vessel is one of the indicia of membership in a crew. While decedent was not assigned to any one boat, but operated any of four during a season five or six months long, no reason has been suggested why he should be any less a member of a crew because he operated four boats rather than one.

The 1939 amendment to the F. E. L. A. is an integral part of the Jones Act, and if any part of decedent's employment was in aid or furtherance of navigation, or directly or closely and substantially affected navigation, petitioner is entitled to recover.

As we have seen, the F. E. L. A. was adopted by the express language of the Jones Act, which gave plaintiffs under that Act the benefit of "all statutes of the United States conferring or regulating the right of action for death of railway employees • • • ".

In 1939 the F. E. L. A. was amended in two respects. The period of limitations contained in that Act was extended from two years to three, and the Act was broadened and liberalized to include in its coverage all employees, any part of whose duties was in interstate commerce.

This amendment has been declared applicable to the Jones Act. In *Chisholm* v. *Cherokee-Seminole S. S. Corp.*, 36 F. Supp. 967, which arose subsequently to the 1939 amendment, suit was started more than two years after the accident, but within three years. The defendant insisted that the suit was barred, since the limitation period was two years at the time it was adopted by the Jones Act, and in that Act there was no express adoption of future amendments. The court held the 1939 amendment applicable, however, saying, pp. 967, 968:

> "But the Jones Act specifically provides that in an action by the injured seaman 'all statutes modifying or extending the common law right or remedy in cases of personal injury to railway employees shall apply.' 46 USCA Sec. 688. This was remedial legislation which called for liberal construction. The *Arizona* v. *Anelich*, 298 U. S. 110. It clearly was intended to cover later changes in the Employers' Liability Act."

To the same effect are:

Streeter v. *Great Lakes Transit Corp.*, 49 F. S. 466.
Gahling v. *Colabee S. S. Co.*, 37 F. S. 759.
The Swiftarrow, 34 F. Supp. 541, (reversed on other grounds, 122 F. 2d 98).

We pointed out at page 17 of our petition that the Court of Appeals for the Second Circuit in *Nordquist* v. *U. S. Trust Co.*, 188 F. 2d 776 had held that the provision of the F. E. L. A. permitting suits against receivers of carriers was, in principle, a survival statute, which could be applied to the Jones Act so as to permit suit against the executor of a deceased shipowner. Respondent sees a kinship between receivers of railroads and executors of shipowners, and agrees that the principle of survival established for the one Act is not inappropriate to the other, but it can see none between railroad employees getting their trains ready for interstate movement, and seamen preparing their ships for navigation; and none between the relation of a railroad man's work to interstate commerce and a seaman's to navigation. We submit the analogy is there in both instances, and that the principle which extends the benefits of the F. E. L. A. to a larger group of employees must work a corresponding extension of the benefits of the Jones Act.

It is argued that no application of the principles established for railroad workers can make a seaman out of an ordinary land laborer. The notion that decedent was a land laborer can only be entertained by disregarding the evidence that he was a licensed navigator, hired to operate boats, and, in accordance with respondent's custom, to get them ready. The cases cited at page 14 of respondent's brief have nothing to do with the relation of the F. E. L. A. to the Jones Act, and when carefully analyzed

they are seen to support the position that a jury could reasonably find that decedent was a member of a crew.

Respondent argues, at page 5 of its brief, that to enlarge the concept of seaman (member of a crew) as used in the Jones Act would, in most instances, be to effect a judicial repeal of the Longshoremen's Act. No such result would follow. The amendment does not make crew members of employees who are fundamentally longshoremen, but clearly brings within the scope of the Jones Act seamen, hired as such to navigate boats, while they are engaged in preparing them for use in navigation. The application of the 1939 Amendment to the Jones Act would leave unaffected longshoremen, harbor workers and laborers, not hired as crew members, who are now under the Longshoremen's Act or state compensation acts. The 1939 Amendment is indicative of the intent of Congress to extend the protection of the Jones Act as stated. The broad and all-inclusive language employed in that Act, adopting all F. E. L. A. legislation, made it unnecessary for Congress in the 1939 amendment, to refer to the Jones Act at all.

Counsel assert (Brief, pp. 10, 11) that the 1939 Amendment to the F. E. L. A. shows on its face "that it has no application to the Jones Act"; that petitioner based her right to recover solely on this amendment on the trial of her case; that her instructions Nos. 2 and 3 and one isolated statement made by her counsel (in discussing instructions with the trial court) so shows. These statements are not in accordance with what actually occurred and are quite misleading.

Petitioner's theory was and is that if decedent was hired for the season to operate defendant's boats, and to get them ready for operation, he was a member of the crew not only while he was running the boats, but also when he

was doing the fitting out work. Petitioner's counsel said, at R. 199:

> "As I understand, this man was a member of a crew in the sense he was the crew at the time and in the preparation and fitting out of this boat, getting it ready for actual service in the Illinois River."

And at page 200:

> "* * * We said the work was pertaining to fitting out the boats which were to be used in the immediate future and this work was part of the operation of the boats * * *."
>
> "We do contend, Judge, that was part of the work of a member of the crew."

The court instructed the jury that petitioner alleged in her complaint that decedent was a seaman and had been employed by respondent as a riverboat operator for the year 1948 and to assist in readying and fitting out boats of the defendant for use in navigation; that all or part of decedent's duties was in actual navigation or so closely related thereto as to be substantially a part of it and that both respondent and decedent became and were subject to the provisions of the Merchant Marine Act. It was further alleged that while so engaged in the due process of his employment decedent came to his death as a result of defendant's negligence.

The court's instructions, we submit, given at petitioner's request, correctly advised the jury (R. 209, 211) that if decedent came to his death while he was engaged in navigation through the negligence of defendant as alleged in the complaint they should find the defendant guilty. There was no evidence that anything less than the major part of his time would be spent operating the boats. He would, of course, operate a boat as its crew and such operation would be actual navigation. The provisions of the instruc-

tions, therefore, which embodied the theory of the 1939 Amendment of the F. E. L. A. may be regarded as superfluous. Since the jury found that decedent had been hired for the season to operate the boats and to get them ready and was killed by aiding in the fitting out work, he was under the Jones Act even should the amendment be held inapplicable, and the instructions stated the law correctly and were properly given.

The pertinent part of the Jones Act provides:

> "Any seaman who shall suffer personal injury in the course of his employment [or his personal representative in case of his death] may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply * * *."

Since it cannot be denied that the Jones Act grants to seamen the same common law remedy to recover for personal injury suffered in the course of their employment, as that given railway employees by the F. E. L. A., as amended in 1939, the right of recovery of such employees if any part of their employment is in interstate commerce, must likewise be rendered applicable to seamen, any part of whose duties is in furtherance of navigation.

The 1939 amendment is indicative of the intent of Congress to confer and extend the right of action under the F. E. L. A. to all whose duties, at any time or place, would entitle them to come within its purview. It is also indicative of the intent of Congress to extend the protection of the Jones Act to all seamen whose duties, at any time or place, would entitle them to take advantage of its provisions.

Thus the law stood at the time of the decision in *O'Donnell* v. *Great Lakes Co.*, 318 U. S. 36 (1942). The question at issue there was whether a seaman, injured on shore

while in the service of his vessel, could recover under the Jones Act. The court found no difficulty in upholding his right of action, saying, p. 39:

> "There is nothing in the legislative history of the Jones Act to indicate that its words 'in the course of his employment' do not mean what they say or that they were intended to be restricted to injuries occurring on navigable waters. On the contrary it seems plain that in taking over the principles of recovery already established for railroad employees and extending them in the new admiralty setting * * * to any seaman injured, in the course of his employment, Congress, in the absence of any indication of a different purpose, must be taken to have intended to make them applicable so far as the words and the Constitution permit, and to have given them the full support of all the constitutional power it possessed."

The court went on to say, pp. 42, 43:

> "The right of recovery in the Jones Act is given to the seaman as such, and, as in the case of maintenance and cure, the admiralty jurisdiction over the suit depends not on the place where the injury is inflicted but on the nature of the service and its relationship to the operation of the vessel plying in navigable waters."

The Court of Appeals is in error in observing, at page 5 of the opinion, that "even though decedent's death occurred on admittedly navigable waters" petitioner is not entitled to recover under the Jones Act "but is restricted to the remedy afforded by the Longshoremen's and Harbor Workers' Compensation Act . . . " Compensation is not payable under the latter act if the vessel being repaired or refitted is under 18 tons net. 33 U. S. C. A. Sec. 903. Respondent's boats were all under 18 tons net. (R. 193.)

We respectfully ask that the petition be granted and that the judgment of the Court of Appeals be reversed and that of the District Court affirmed.

Respectfully submitted,

JOSEPH D. RYAN,

Attorney for Petitioner.

Office-Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951.

No. 231

ANNA DESPER, ADMINISTRATRIX OF THE ESTATE OF THOMAS J. DESPER, JR., DECEASED,

Petitioner,

vs.

STARVED ROCK FERRY COMPANY,
A CORPORATION,

Respondent

RESPONDENT'S BRIEF.

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INDEX.

	PAGE
Argument	3
Essential facts	1
Questions presented	3

SUMMARY OF ARGUMENT.

The Court of Appeals did not construe the Jones Act narrowly. Its holding is consistent with the decisions of this Court and those of other courts of appeals 3

The 1939 amendment to the Federal Employers' Liability Act extending the benefits of that Act to employees whose duties shall be the furtherance of interstate commerce or whose duties shall, in any way directly or closely and substantially, affect such commerce is wholly inapplicable in determining whether Desper was a seaman within the meaning of the Jones Act 8

In this case the only reasonable conclusion that could be drawn from the evidence is that Desper was not a seaman within the meaning of the Jones Act. In arriving at this inevitable conclusion the Court of Appeals did not usurp the function of the jury..... 16

The nature of the services rendered by the employee at the time of the accident are determinative as to whether he, or his personal representative, may recover under the Jones Act 18

Where, as in this case, the services were not rendered to a vessel in navigation, the person performing such services is not a member of a crew of a vessel 21

Desper's services were not maritime but the determination of such question is not decisive in this case for many, if not most, maritime employees may not prosecute a claim for injuries under the Jones Act. The pertinent question is whether such employee is a member of a crew of a vessel in navigation..... 24

The cases cited by petitioner are not in point and the decision of the Court of Appeals in this case is not in conflict with them 26

LIST OF AUTHORITIES.

Antus v. Inferocean S. S. Co., 108 F. 2d 185.....14, 21, 27

Arizona v. Anelich, 298 U. S. 110 14

Barnsdall Refining Corp. v. Cushman-Wilson Oil Co.,

Baskin v. Industrial Accident Commission, 338 U. S. 854 25

Bethlehem Steel Co. v. Moore, 335 U. S. 874 25

Boston & M. R. R. Co. v. Armburg, 285 U. S. 234..... 16

Brady v. Southern R. Co., 320 U. S. 476..... 17
97 F. 2d 481 11

Claussen v. Brothers, 148 S. C. 1 8

Daffin v. Pape, 170 F. 2d 622 27

De Wald v. Baltimore & O. R. Co. (CCA 4th) 71 F. 2d 810 .....19, 20

Diomede v. Lowe, (CCA 2d) 87 F. 2d 296 ..... 19, 20

Frankel v. Bethlehem-Fairfield Shipyard, 46 F. Supp. 242 (cert. den. 319 U. S. 746) 24

Gadd v. McGuire, 69 Cal. App. 347 12

Gonzales v. United States, 3 F. 2d 168 23

Hagens v. United Fruit Co., 135 F. 2d 842 21

Hawn v. America S. S. Co., 107 F. 2d 999 23

Henderson v. Jones, 110 F. 2d 952 20

Hunt v. United States, 17 F. Supp. 578 ..... 26, 27

International Stevedoring Co. v. Haverty, 272 U. S. 50 ..... 5, 18, 19, 26

Jones, et al. v. Dexter, Adm. et al., 8 Fla. 276 11

Jones Foundry Co. v. Industrial Commission, 312 Ill. 27 7

Jones v. Shepard, 20 F. Supp. 345 ..... 26, 27

Kellar v. James, 63 W. Va. 139, 142 8

Lake Shore & M. S. R. Co. v. Benson, 85 Ohio St. 215 8

Long Island R. Co. v. Lowe, 145 F. 2d 516 14

Massman Const. Co. v. Bassett, 30 F. Supp. 813 24

Matthews, Finley & Co. v. Sands & Co., 29 Ala. 136 13

Moore Dry Dock Co. v. Pillsbury, (CCA 9th) 100 F. 2d 245 ..... 19, 20

Nordquist v. U. S. Trust Co. of N. Y., 188 F. 2d

Northern Coal & Dock Co. v. Strand, 278 U. S. 142 5
776 (2d Cir.) 14

Norton v. Warner Co., 321 U. S. 565 20

O'Donnell v. Great Lakes Dredge & Dock Co., 318 U. S. 36 ..... 5, 7, 10

Overstreet v. Northshore Corp., 318 U. S. 125 10

Schantz v. American Dredging Co., 138 F. 2d 534 20

Seneca Washed Gravel Co. v. McManigal, 65 F. 2d 779 ..... 14, 23

South Chicago Coal and Dock Co. v. Bassett, 309 U. S. 251 ..... 4, 5, 7, 16, 18

Southern P. Co. v. Jensen, 244 U. S. 205 5

Spencer & Son Corp. v. Lowe, 152 F. 2d 847 21

Standard Oil Co. v. Lane, 75 Wis. 636 8

State v. Board, 175 Ind. 400 13

State v. Board of Commissioners, 170 Ind. 595 12

State v. Board of Commissioners, 83 Kan. 199 13

State v. Frear, 144 Wis. 79 13

State Industrial Commission v. Nordenholt Corp., 259 U. S. 263 24

Swanson v. Marra Bros., 328 U. S. 1 ..... 6, 7, 10, 18, 26

Taylor v. McManigal, 89 F. 2d 583 ..... 14, 20, 23, 27

Union Oil Co. v. Pillsbury, 63 F. 2d 925 24

United States v. Grogg, 9 F. 2d 424 7

United States v. Lindgren, 28 F. 2d 275 ..... 26, 27

Weaver v. Pittsburgh Steamship Co., 153 F. 2d 597 27

STATUTES.

Longshoremen's and Harbor Workers' Compensation Act, (44 Stat. 1424, 33 U. S. C., sec. 901, et seq.) 4, 5, 7, 18, 25, 27

The Federal Employers' Liability Act (35 Stat. 65, 45 U. S. C. sec. 51) 9, 11, 14, 16

The Jones Act, (41 Stat. 1007, 46 U. S. C. sec. 688) 3, 4, 5, 6, 7, 9, 10, 11, 14, 15, 17, 18, 23, 25, 27, 28

1939 Amendment to the Federal Employers' Liability Act (53 Stat. 1404, 45 U. S. C. sec. 51) 3, 8, 9, 10, 11, 15, 16

MISCELLANEOUS.

2 Lewis Sutherland on Statutory Construction, sec. 405 11

50 Am. Jur., Statutes, sec. 387 8

IN THE

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Petitioner,

VS.

STARVED ROCK FERRY COMPANY, A CORPORATION,

Respondent

RESPONDENT'S BRIEF.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Statement of the Case.

The Facts.

The Court of Appeals' statement of the facts is accurate and affords a proper understanding of the case. However, it is believed a few added details of the case as shown by the record will afford a helpful supplemen-

tation and provide a more complete presentation of the essential facts and circumstances.

Among the five or six men who comprised the working force of the defendant at about the time of the accident, there was a painter, a painter's helper, a machinist, a laborer and a welder, some of whom had no connection whatsoever with the operation of the motor launches during the operating season. (Rec. 61, 62, 113.) These men performed the sundry tasks which were mentioned in the Court of Appeals' statement.

Further, during the period of the re-employment of petitioner's intestate, Thomas J. Desper, hereinafter referred to as Despor, and up to the date of the accident, the motor boats remained on dry land and neither the boats nor the barges were moved. (Rec. 63, 64, 92, 108, 109.) The men employed by respondent during the period in question worked eight hours per day at a stipulated hourly rate, except the painter who worked under a contract. (Rec. 116, 126, 179, 180.) With the exception of one, George Claudnic, the only year-round employee in respondent's employment and whose combined duties included at various times the work of a machinist, foreman, watchman, and during the operating season, those of an operator of a sight-seeing launch, the men neither ate, nor were furnished with quarters on board any vessel. (Rec. 129.) Moreover, no ship's discipline was maintained. (Rec. 182.) During the time Desper was employed by respondent, he lived at home. (Rec. 165, 166.)

The additional facts stated on pages 6 and 7 of the PETITION that seamen operating small boats on the Illinois River never worked under ship's discipline or lived on the boats are without evidentiary support in the record.

Likewise, petitioner is in error in referring to Desper as a "licensed navigator" inasmuch as the only license Desper had was a license to operate a small motor launch during the season. He did not have a navigator's license, but instead had only what might be termed an "operator's" license. (Rec. 87, 224.)

The Questions Presented.

Respondent believes that the questions presented may be more accurately stated as follows:

1. Whether the word "seaman," as used in the Jones Act means a member of a crew of a vessel plying navigable waters.

2. Whether the statute of one as a member of a crew of a vessel is determined by (a) the nature of his services at the time of the accident, and (b) whether the services then being performed were rendered in navigation.

3. Whether the 1939 amendment to the Federal Employers' Liability Act is applicable in determining if an employee is a seaman within the meaning of the Jones Act.

I.

The Court of Appeals Did Not Place a Narrow Construction on the Jones Act.

Petitioner's argument in support of her contention in this Court begins on page 8 of her PETITION with the assertion that the decision of the Court of Appeals results in denying to seamen the benefits of the Jones Act.

It is respectfully submitted that the clear language of the decision does not permit of such construction. Under

the principles of law and conclusions therein stated, the decision does not deny to any seamen the benefits of the Jones Act. The decision simply holds that under the undisputed facts as shown by the record in the instant case, Desper was not a seaman within the meaning of the Jones Act.

The position of the Court of Appeals on this point is in accordance with both statute and authority.

In 1927, the Congress enacted the Longshoremen's and Harbor Worker's Compensation Act (44 Stat. 1424, 33 U.S.C., sec. 901, et seq.) section 2(3)(4) of which provides as follows:

> "(3) The term 'employee' does not include a master or member of a crew of any vessel, nor any person engaged by the master to load or unload or repair any small vessel under eighteen tons net.
>
> "(4) The term 'employer' means an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any dry dock)."

The policy as thus expressed by the Longshoremen's Act was examined and the narrowing effect of its provisions upon the interpretation of the word "*seaman*", as used in the Jones Act, was judicially recognized in *South Chicago Coal and Dock Co.* v. *Bassett,* 309 U.S. 251, in which this Court said (p. 256):

> "* * * The bill, which became the Longshoremen's and Harbor Workers' Compensation Act, was at one stage amended so as to include a master and members of a crew of a vessel owned by a citizen of the United States. They preferred however to remain outside the compensation provisions and thus to retain the advantages of their election under the Jones

Act, and the bill was changed accordingly so as to exempt 'seamen.' Then, in its final passage, the words, 'a master or member of a crew' were substituted for 'seamen.' We think that this substitution has an important significance here. For we had held that longshoremen engaged on a vessel at a dock in navigable waters, in the work of loading or unloading, were 'seamen.' *International Stevedoring Co.* v. *Haverty*, 272 U.S. 50; *Northern Coal & Dock Co.* v. *Strand*, 278 U.S. 142. And, also, that such seamen if injured on a vessel in navigable waters, unlike one injured on land, could not have the benefit of a state workmen's compensation act. *Southern P. Co.* v. *Jensen*, 244 U.S. 205. We think it is clear that Congress in finally adopting the phrase 'a master or member of a crew' in making its exception, intended to leave entitled to compensation all those various sorts of longshoremen and harbor workers who were performing labor on a vessel and to whom state compensation statutes were inapplicable. * * *"

Thus it appears that the "narrow" construction of the Jones Act complained of by petitioner (PETITION, p. 8) is no more than a fair application of the legislative intent. To hold, as petitioner contends (PETITION, p. 17) that the "concept of seamen" should be enlarged "so as to include employees any part of whose duties are those of a member of a crew" would, in most instances, effect a judicial repeal of the Longshoremen's and Harbor Workers' Compensation Act, contrary to the express enactment of Congress and contrary to the construction and interpretation of the purpose and scope of such statute by this Court.

O'Donnell v. *Great Lakes Dredge & Dock Co.*, 318 U. S. 6, was decided since the decision in *South Chicago Coal and Dock Co.* v. *Bassett*, 309 U. S. 251. In the *O'Donnell*

case the plaintiff was a member of the crew of a vessel lying in port in navigable waters. Although the plaintiff was ashore when injured, recovery was permitted under the Jones Act, the Court stating the test of jurisdiction as follows (p. 42):

> "The right of recovery in the Jones Act is given to seamen as such and, as in the case of maintenance and cure, the admiralty jurisdiction over the suit depends not on the place where the injury is inflicted *but on the nature of the service and its relationship to the operation of the vessel plying in navigable waters.*" (Emphasis supplied.)

A later important decision directly bearing upon the point under discussion was given in *Swanson* v. *Marra Bros.*, 328 U. S. 1, in which case this Court said (p. 7):

> "*We must take it that the effect of these provisions of the Longshoremen's Act is to confine the benefits of the Jones Act to the members of the crew of a vessel plying in navigable waters and to substitute for the right of recovery recognized by the Haverty Case only* such rights to compensation as are given by the Longshoremen's Act. *But since this Act is restricted to compensation for injuries occurring on navigable waters, it excludes from its own terms and from the Jones Act any remedies against the employer for injuries inflicted on shore. The Act leaves the injured employee in such cases to pursue the remedies afforded by the local law, which this Court as often held permits recovery against the employer for injuries inflicted by land torts on his employees who are not members of the crew of a vessel.* * * *" (Emphasis supplied.)

The above-quoted rule of law, prescribing the legal basis for recovery under the Jones Act, made after consideration and analysis of the entire body of law pertaining to recovery by employees for injuries in maritime

work is definitive, determinative, and authoritative. It is respectfully submitted that it must now be accepted that in a suit under the Jones Act, in order to establish liability it must be proved that the injured employee was a member of a crew of a vessel plying in navigable waters.

What petitioner seeks to achieve under guise of liberal construction is to persuade this Court to become oblivious to the actual facts of the case, which are clearly stated in the opinion of the Court of Appeals, and to distort the plain meaning of the words of the rule of law as declared by this Court. The petitioner apparently wants this Court to hold that there is navigation when, in fact, there is no navigation and to hold that Desper was a member of a crew when there was no crew.

It is respectfully submitted the Court of Appeals in its decision correctly applied to the undisputed essential facts in this case the pertinent and relevant rules of law as declared by Congress in the Longshoremen's and Harbor Workers' Compensation Act and as expressed by this Court in the *Bassett, O'Donnell* and *Swanson* cases, *supra*. Respondent respectfully submits that a contrary holding would have constituted a disregard of established rules of statutory construction and the doctrine of *stare decisis*.

As was stated by the Supreme Court of Illinois in *Jones Foundry Co.* v. *Industrial Commission*, 312 Ill. 27:

> "We cannot stretch the law (Workmen's Compensation Act of Illinois) to embrace a case clearly not within the contemplation of the statute."

In *United States* v. *Grogg*, 9 F. 2d 424, on the point of liberality of construction, the court stated (p. 428):

"It is also argued that the act of 1904 is a remedial statute and should be liberally construed, so as to suppress the evil and advance the remedy • • • The duty to liberally construe remedial statutes *'stops far short of carrying the statute to purposes and objects entirely beyond those mentioned in it.'*" (Emphasis supplied).

The italicized language, which the court took from *Kellar* v. *James*, 63 W.Va. 139, 142 is peculiarly applicable to the instant problem and it is a judicial answer to petitioner's seeking in the instant case to extend the 1939 amendment to the Federal Employers' Liability Act to purposes entirely beyond those mentioned and wholly foreign to its intended scope and purpose. (See, also, *Standard Oil Co.* v. *Lane*, 75 Wis. 636; *Lake Shore & M. S. R. Co.* v. *Benson*, 85 Ohio St. 215; *Claussen* v. *Brothers*, 148 S. C. 1., and 50 Am. Jur., Statutes, sec. 387.)

The petitioner simply refuses to admit or concede the existence of plain and obvious facts. It cannot be questioned that respondent's boats were on dry land and had been there for five months, during which period they had not been moved a single foot in water or even on land. The boats were in various states of repair and one was being reconstructed. There is nothing narrow or technical about a truthful statement that such boats were not plying navigable waters and were not in navigation.

II.

The 1939 Amendment to the Federal Employers' Liability Act Is Wholly Inapplicable in This Case.

On pages 9 to 11 and, again, beginning on page 16 of the PETITION, it is urged that the provisions of the

Federal Employers' Liability Act,[1] and the 1939 amendment[2] to it, made Desper a seaman within the meaning of the Jones Act.[3]

---

1. THE FEDERAL EMPLOYERS' LIABILITY ACT (35 Stat. 65, 45 U.S.C. sec. 51):

"Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."

2. THE 1939 AMENDMENT TO F.E.L.A. (53 Stat. 1404, 45 U.S.C. sec. 51):

"Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purpose of this chapter, be considered as entitled to the benefits of this chapter."

3. THE JONES ACT (41 Stat. 1007, 46 U.S.C. sec. 688):

"Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury and in such action all statutes of the United States modifying or extending the common law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located."

This argument begins with the suggestion that the word "employment" in two statutes should be identically construed. The one act affords a remedy to *any person* employed by a common carrier by railroad engaged in furthering or substantially affecting interstate commerce, whereas the Jones Act gives a right of action at law to any *seaman* injured in the course of his employment.

Thus it is manifest from the wording of the two statutes that the problem presented can neither be obscured nor solved by a dissertation on the meaning of the word "employment" or by a review of the decided cases construing the phrase "in the course of his employment."

Instead, the problem is to determine the meaning of the word "seaman" as used in the Jones Act and the answer to this problem already has been explicitly given by this Court in *Swanson* v. *Marra Bros.*, 328 U.S. 1, and *O'Donnell* v. *Great Lakes Dredge & Dock Co.*, 318 U. S. 36.

In view of this Court's having determined the meaning of the word "seaman" as used in the Jones Act, and it appearing from the undisputed facts in this case that Desper was not a "seaman" within the meaning of such term as declared by statute and as defined by this Court, it follows that petitioner's discussion of cases such as *Overstreet* v. *Northshore Corp.*, 318 U. S. 125, involving determination of the words "employment" or any other words or phrases other than "seaman", can be of no assistance to this Court and cannot vary the undisputed facts in the instant case so as to make Desper a member of the crew of a vessel.

That petitioner at last realizes the futility of her endeavor to apply the 1939 amendment of the F.E.L.A. to the facts of this case is apparent from her concession

that even if such amendment is inapplicable the error is harmless. (PETITION, p. 18.) Instructions Nos. 2 and 3 (Rec. 209-211) include this element of her theory of the case and were given by the trial judge. During the discussion of instruction No. 2 the following colloquy took place:

"The Court: Well, that is their theory of this law suit. If they can't sustain that theory, they don't have any law suit.

"Mr. Davidson (for petitioner): That is the whole thing in a nut shell." (Rec. 194.)

It is elementary that a litigant may not try his case on one theory in the court below and upon another in the reviewing court. (*Barnsdall Refining Corp.* v. *Cushman-Wilson Oil Co.*, 97 F. 2d 481.)

The 1939 amendment to the Federal Employers' Liability Act, by its very language and on its face, shows that it has no application to the Jones Act. The Jones Act adopts only such portions of the Employers' Liability Act as are germane to the subject of maritime law. The words of the 1939 amendment unmistakably indicate that such amendment was intended to be limited to interstate commerce by rail transportation.

In discussing the effect of a reference statute in 2 Lewis' Sutherland on Statutory Construction it is stated in sec. 405 as follows:

> "* * * When, so adopted, only such portion is in force as relates to the particular subject of the adopting act, and as is applicable and appropriate thereto."

A judicial statement of the same rule may be found in *Jones, et al.* v. *Dexter, Adm. et al.*, 8 Fla. 276, where

the court analyzes many earlier authorities, both American and English. The following quotation is from the headnote:

> "Where a statute has been enacted with special reference to a particular subject and by another statute its provisions are directed in general terms to be applied to another subject of an essentially different nature, the adopting statute must be taken to mean that the provisions of the original statute shall be restrained and limited to such only as are applicable and appropriate to the new subject."

And in *State* v. *Board of Commissioners*, 170 Ind. 595, the Supreme Court of Indiana said (p. 619):

> "* * * It is well settled that one statute may adopt a part of, or all of, another law or statute by a specific and descriptive reference thereto, and the effect is the same, as if the law or statute or the part thereof adopted had been written into the adopting statute. (Authorities cited) *When so adopted, only such portion is in force as relates to the particular subject of the adopting act, and is applicable and appropriate thereto.* (Italics supplied.)

In *Gadd* v. *McGuire*, 69 Cal. App. 347, the California court said (p. 369):

> "* * * It is well established that the Legislature may extend the provisions of an existing statute to a new subject by an appropriate reference to such statute in the new act, *only those provisions of the extended act being incorporated into the new one which are appropriate to the new subject.*" (Italics supplied.)

These cases are representative not of the great weight of authority but the unanimous opinions of all courts and text writers.

A few of the other manys cases are: *State* v. *Board of Commissioners*, 83 Kan. 199; *State* v. *Board*, 175 Ind. 400, and *Matthews, Finley & Co.* v. *Sands & Co.*, 29 Ala. 136.

It may be true that the amendment under discussion would have some effect if the words "interstate" and "or foreign" were stricken from it and the word "navigation" substituted for the word "commerce" but respondent respectfully and earnestly submits that such construction of the amendment would constitute unwarranted judicial legislation.

In this connection the very interesting case, *State* v. *Frear*, 144 Wis. 79, is especially in point. In such cited case the Supreme Court of Wisconsin had to determine the extent to which a primary election law incorporated the provisions of a general election law and which portions of the latter law should be and should not be applied in a primary election.

In an elaborate opinion, the Wisconsin court said, on page 99:

> "* * * By generously carrying out the algebraic processes of elimination, by substitution and by addition and subtraction, it is possible to so remold section 34 as to make it fit this case, but we do not think the Legislature intended that we should do so, or that the citizen should be obliged to go through such a process to determine what the statute law of the state is. We fail to see how the word 'vacancy' can be stricken from the statute, if it is to retain any life that would be helpful to the defendant, because it is only where a vacancy occurs that action can be taken by the party committee. * * *"

Common sense, reason, and logic demonstrate that petitioner's position is untenable; moreover, legal precedents,

without dissent, are in complete and harmonious rejection of the highly irrational theory she advances. Respondent respectfully and earnestly submits such legally unsupported theory should be flatly spurned by this Court.

The petitioner cites *Nordquist* v. *U. S. Trust Co. of N. Y.*, 188 F. 2d 776 (2d Cir.) which holds that an action under the Jones Act survives the death of the defendant. Such cited case actually is authority for the respondent for it sustains the proposition that the adopting statute adopts only such portions of the adopted act as relate to the subject matter. It should not require argument to demonstrate some kindredship between the two laws with respect to the survival of the action; however, such analogy does not make a seaman out of an ordinary land laborer. The maritime law has not indulged in this fiction. (*Long Island R. Co.* v. *Lowe*, 145 F. 2d 516.) The decisions in *Antus* v. *Interocean S. S. Co.*, 108 F. 2d 185; *Seneca Washed Gravel Co.* v. *McManigal*, 65 F. 2d 779, and *Taylor* v. *McManigal*, 89 F. 2d 583, are squarely against it. Desper could have the status of a member of a crew of a vessel only had his activities met the requirements of the legal definition of a member of a crew of a vessel plying navigable waters.

That the Federal Employers' Liability Act does not encroach upon the ancient maritime principles was established by this Court in *Arizona* v. *Anelich*, 298 U. S. 110, cited on page 9 of the PETITION. In such cited case the defense of assumption of risk was interposed because such defense at that time was meritorious in an action brought under the Federal Employers' Liability Act. In holding such defense to be without merit this Court said (p. 123):

"* * * The denial in the Federal Employers' Liability Act of the defense of assumption of risk refers only to suits founded on the Federal Safety Appliance Act, *applicable alone to railroads.* It can raise no inference as to the availability of the defense in suits brought to recover for injuries to seamen. No provision of the Jones Act is inconsistent with the admiralty rule as to assumption of risk. The purpose and terms of the Act *and the nature of the juristic field in which it is to be applied,* preclude the assumption that Congress intended, by its adoption, to modify that rule by implication. * * *" (Emphasis supplied.)

The statement on page 17 of the PETITION to the effect that the 1939 amendment to the Federal Employers' Liability Act is a Congressional mandate which requires a corresponding enlargement in the construction of the Jones Act is simply an assertion which cannot be legally supported. One law permits an action by railroad employees under certain circumstances because it expressly says so. The other Act—the Jones Act—does not say what petitioner contends it provides and it has never been so construed; it gives a right of action to seamen. The 1939 amendment affects railroad employees, as intended, and has no effect whatsoever on seamen for they are in a different "juristic field."

It may be that at some future time Congress will amend the Jones Act to extend its benefits to those whose duties "shall be the furtherance of" or shall "in any way directly or closely and substantially, affect" navigation. However, until such time, it is submitted that under the Jones Act as it presently stands, the remedy is available only to members of the crews of vessels in navigation.

Moreover, if the 1939 amendment to the Federal Employers' Liability Act is controlling, then the petitioner cannot recover in this case for Desper was never, even in the remotest degree, engaged in the furtherance of interstate commerce. His claimed position (furthering the operation of an intrastate movement on a river which may be used as an artery of interstate commerce) is precisely the same as that prevailing on a local suburban train which happens to run on a track which is also used by interstate trains. It is well settled that such employee has no right of action under the Federal Employers' Liability Act. (See: *Boston & M. R. R. Co.* v. *Armburg,* 285 U. S. 234.)

III.

The Court of Appeals Properly Decided That Desper Was Not a Member of a Crew.

(a) The Court of Appeals did not usurp the function of the jury.

The petitioner urges that the Court of Appeals substituted its judgment for that of the jury and in support of such contention, on pages 18 and 19 of her PETITION she cites a number of cases, including *South Chicago Coal and Dock Co.* v. *Bassett,* 309 U. S. 251.

The *Bassett* case is no authority for the proposition that the Court of Appeals may not properly enter judgment for defendant on the question whether or not sufficient evidence was produced to establish that Desper was a member of the crew. It is here pertinent to observe, however, that in such cited case this Court held (page 260) that the term crew embraces those who are naturally and *primarily* on board the vessel to aid in her

navigation. Thus, has this Court heretofore answered the contention advanced on page 19 of the PETITION that employees are seamen and are granted benefits under the Jones Act if *any part* of their duties is in furtherance of navigation.

No attempt will be made to discuss individually each of the other cases petitioner cites in this connection but it may be remarked that in those other than the railroad cases (which, manifestly, are not in point) each one involves the question of whether or not a person was a member of a crew or a harbor worker and in each case the vessel in question was actually lying (or plying) in navigable waters and there was some evidentiary basis for finding the plaintiff to be a member of the crew. Not one of the cases cited by petitioner involved employment on or about a boat which was blocked and cribbed on dry land for a period of five months, or for any other length of time. In not one of such cases were the present and actual duties or tasks of employment disregarded and the decision based either on what was considered to be the main purpose of the hiring (where that differed from the duties actually performed) or on proposed future employment and future duties.

It repeatedly has been held that where no factual issue has been raised, it is the duty of the trial court to direct a verdict. In *Brady* v. *Southern R. Co.*, 320 U. S. 476, the Court said (p. 479):

> "* * * When the evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict, the court should determine the proceeding by non-suit, directed verdict or otherwise in accordance with the applicable practice without submission to the jury, or by judgment notwithstanding the verdict. By such

direction of the trial the result is saved from the mischance of speculation over legally unfounded claims. (Cases cited.)"

Though the petitioner argues that this Court has consistently adhered to the position taken in *International Stevedoring Co.* v. *Haverty*, 272 U.S. 50, she cannot deny that the effect of the decisions in *South Chicago Coal and Dock Co.* v. *Bassett*, 309 U. S. 251, and *Swanson* v. *Marra Bros.*, 328 U. S. 1, is, at least, to limit recovery under the Jones Act to members of a crew. Moreover, petitioner's statement that the Longshoremen's and Harbor Workers' Compensation Act left unaffected the rights "of other seamen" to recover under the Jones Act begs the question for it assumes that Desper was a seaman as such term has been defined by this Court. That such assumption is without merit is conclusively demonstrated by the holdings in the *Bassett* and *Swanson* cases.

(b) Whether Desper was a member of the crew of a vessel is determined by (1) the nature of the services of his employment at the time of the accident, and (2) the fact whether the services then being rendered were performed in navigation.

(1) *The Nature of the Services Rendered are Determinative.*

The decisive test in this case is the nature of the relationship of the employee to a vessel plying in navigable waters and the character of the services rendered to such vessel. The nature of such relationship has been subject to judicial interpretation on many occasions.

In the leading case—*South Chicago Coal Co.* v. *Bassett*, 309 U.S. 258—where an employee sustained a fatal accident while at work on a vessel, the court said (p. 260):

"This (Longshoremen's) Act, as we have seen, was to provide compensation for a class of employees at work on a vessel in navigable waters who, although they might be classed as seamen (*International Stevedoring Co.* v. *Haverty*, 272 U.S. 50, *supra*), were still regarded as distinct from members of a 'crew'. They were persons serving on vessels, to be sure, but their service was that of laborers, of the sort performed by longshoremen and harbor workers and thus distinguished from those employees on the vessel who are naturally and primarily on board to aid in her navigation. See *De Wald* v. *Baltimore & O.R. Co.* (CCA 4th) 71 F. 2d 810; *Diomede* v. *Lowe*, (CCA 2d) 87 F. 2d 296; *Moore Dry Dock Co.* v. *Pillsbury*, (CCA 9th) 100 F. 2d 245.

"The question concerns his actual duties. These duties, as the Court of Appeals said, did not pertain to navigation, aside from the incidental task of throwing the ship's rope or making the boat fast, a service of the sort which could readily be performed or aided by a harbor worker. What the court considered as supporting the finding of the deputy commissioner was that the primary duty of the decedent was to facilitate the flow of coal to the vessel being fueled, that he had no duties while the boat was in motion, that he slept at home and boarded off ship and called each day as he was wanted and was paid an hourly wage. Workers of that sort on harbor craft may appropriately be regarded as 'in the position of longshoremen or other casual workers on the water.'"

It is therefore obvious that not every person who renders services on board a vessel is a member of the crew even though his duties are in furtherance of navigation in the sense petitioner uses such phrase. Besides the specific nature of the actual work performed, certain other indicia are conclusive in determining the line of demarcation between members of a crew and ordinary shore or harbor workers. These conditions are outlined

concisely in *Moore Dry Dock* v. *Pillsbury*, 100 F. 2d 245, where the court held one is not a member of a crew who is paid on an hourly basis rather than monthly, who neither eats nor sleeps on board a vessel, and who does not surrender his personal rights and liberties as a seaman in exchange for maintenance, cure and wages.

So in *Henderson* v. *Jones*, 110 F. 2d 952, an employee of a river vessel which was tied up whose duties were to fire a boiler, who had signed no seaman's articles, who was paid by the hour only for the actual hours worked and who ate and slept at home and worked only on the days needed, was held not to be a member of the crew.

And in *De Wald* v. *Baltimore & O. R. Co.*, 71 F. 2d 810, a claimant whose principal work was in loading and unloading and keeping a record of the cargo, and who occasionally handled a line to make a barge fast at a dock, or to pump water out of it, and who did not live upon the barge but went home every night, was held not to be a member of a crew.

In *Domede* v. *Lowe*, 87 F. 2d 296, upon facts substantially similar to those in the *De Wald* case, except that the claimant lived on the barge, it was held he was not a member of the crew.

Many other cases involving the same question may be cited and while absolute agreement in all factual details cannot be expected, in the main the principal test for determining the legal status of a given person on board a vessel, *i.e.* whether or not he is a member of the crew, is whether his services are chiefly to aid in navigation. *Taylor* v. *McManigal*, 89 F. 2d 583; *Norton* v. *Warner Co.*, 321 U.S. 565; *Schantz* v. *American Dredging Co.*, 138

F. 2d 534; *Spencer & Son Corp.* v. *Lowe*, 152 F. 2d 847; *Hagens* v. *United Fruit Co.*, 135 F. 2d 842.

In the case at bar, Desper rendered no services in "aid of navigation" as that phrase is defined in the foregoing cases. If the duties and activities of Desper are considered from the date he began employment in March 1948, until the date of the accident, every service and duty which he performed was that of a shore worker. Despite what his duties might have been in the summer season, no service or duty which he actually did perform at the time of the accident had reference to the present navigation of a vessel or the movement of a vessel; the launches were on dry land and had been there since the previous November. Furthermore, Desper did not eat or sleep on board a vessel; he worked eight hours a day, was paid at an hourly rate, spent all of his time on shore or on the barges and did not incur the hazards of the sea; nor was he subject to ship's discipline, nor was he assigned to a specific vessel. Neither the work he performed nor his relationship to any vessel was such as to constitute him a member of the crew of any vessel. Unless almost each and every distinction developed in the above-cited cases is to be wholly disregarded, the decision of the Court of Appeals is correct.

(2) *The persons rendering services to vessels not in navigation are not deemed members of a crew of a vessel.*

The respondent was engaged in no operations at the time of the accident which can be legally characterized as "navigation."

In *Antus* v. *Interocean S. S. Co.*, 108 F. 2d 185, the accident occurred shortly after the sailing season ended and when the ship was being put in winter quar-

ters; claimant, who had been a member of the crew during the sailing season, had been paid off, but had been retained on board to assist in laying up the vessel, and while doing such work he was hurt. In holding that at the time of the accident there was no crew on board, the court declared that the fact he had at one time been a member of the crew was of no significance. The court said (p. 187):

> "But the question is whether at the time of the accident he was engaged in maritime work and the test is the nature of his employment at that time. While the work done had direct relation to navigation, it neither was performed during the navigation season, nor was it even preparatory to navigation. Appellant was laying up the engine and packing the pumps and seacocks so that they would not freeze. He was taking bolts out of the piston-heads, an operation which was never done during navigation. It would have taken from four to eight hours to put the engines together again to operate. The vessel, while not consigned to a ship's graveyard, was tied up to the piles. Instead of doing this work in preparation for navigation, the men were preparing this vessel for winter quarters. *Appellant was not subjected to any maritime hazards. The fact that he had been, or expected in the future to be a seaman does not render maritime work which was not maritime in its nature. The finding of the District Court upon this point was correct, and appellant was not at the time of his injury a seaman. Therefore he was not entitled to sue under section* 668 *of Title* 46, *U.S.C.*, 46 *U.S.C.A.* 688.
>
> "Neither was appellant at the time of the injury a member of the crew. *The most that may be said is that he (appellant), with the other men working on the boat, expected to become members of the crew when it was organized and when the vessel was ready to sail.*" (Emphasis supplied.)

In its decision, in referring to *Taylor* v. *McManigal*, 89 F. 2d 583, the court then stated (p. 187):

> "There, as in the instant case, appellant was not at the time of the accident a member of the ship's crew which mans and navigates the vessel, for no crew was on board."

Seneca Washed Gravel Co. v. *McManigal*, 65 F. 2d 779, is also in point. In that case the claimant was a watchman on a vessel which was still in winter quarters at the time he was injured. The ship was not placed in service until two weeks after the injury. He was held not to be a member of a crew.

Another case controlling on this point is *Taylor* v. *McManigal*, 89 F. 2d 583. In such cited case the deceased was hired for the season as an assistant engineer on a vessel but, when injured, he was doing general labor work on such vessel before the season started and as a part of fitting-out the ship. It was held that the claimant was not a member of the crew.

In *Gonzales* v. *United States*, 3 F. 2d 168, where injuries were sustained on a vessel which was part of a laid up fleet, it was held that the claimant was not a seaman. The court said that the test which determines whether they are seamen entitled to sue under the Jones Act is "navigation."

And in *Hawn* v. *America S. S. Co.*, 107 F. 2d 999, a suit arising under the Jones Act, the injuries occurred aboard a vessel lying in navigable waters which was being used to store grain. It was held that the vessel, being presently withdrawn from navigation, had no crew.

While a vessel temporarily out of service may be considered still in navigation as where the crew is kept

intact and ship discipline observed, nevertheless, where it is laid up for the winter or for a long period of repairs, its crew discharged and separated, it is then effectively withdrawn from navigation and commerce. *Union Oil Co.* v. *Pillsbury*, 63 F. 2d 925. Until it is returned to, and again has entered navigation, persons employed about such a vessel cannot be considered as members of a crew, but are merely a gang of shore workers.

IV.

Desper's Work Was Not Maritime But, Even If It Were, Petitioner Cannot Recover Damages Under the Jones Act.

On page 14 of the PETITION a number of cases are cited in support of petitioner's argument that at the time Desper sustained his fatal injuries he was engaged in maritime employment. These cases are distinguishable in that they all involve either maritime contracts where a different test is applied to determine whether or not maritime law controls, or torts occurring on navigable waters, not on land. The respondent submits that cases such as *State Industrial Commission* v. *Nordenholt Corp.*, 259 U.S. 263, *Frankel* v. *Bethlehem-Fairfield Shipyard*, 46 F. Supp. 242 (cert. den. 319 U.S. 746.) and *Massman Const. Co.* v. *Bassett*, 30 F. Supp. 813, are authorities which compel the conclusion that Desper's employment was non-maritime.

However, the point is not particularly relevant for whether or not the services performed by Desper were maritime the petitioner must fail in her action.

Since the enactment of the Longshoremen's and Harbor Workers' Compensation Act, maritime workers "in whole or in part" except the master and members of a crew, under the provisions of paragraphs (3) and (4) of section 2 of such Act, who are injured on navigable waters, have their remedy under such Act, and not under the Jones Act. The crucial inquiry, therefore, is the question of Desper's status as a member of a crew of a vessel in navigation, not whether his work was, in one respect or another, maritime. Petitioner's argument is that because all persons under the Jones Act are subject to maritime law all persons subject to maritime law are under the Jones Act. If such contention is reduced to syllogistic form its fallacy is immediately perceived.

Moreover, both parties hereto have submitted to the jurisdiction of the Industrial Commission of Illinois; there has been an award in petitioner's favor but she has sought a review of such award. (Rec. 15, 27, 28, 245, PETITION, p. 7.)

Under recent decisions of this Court, it is now definitely established that injuries or fatalities suffered by employees doing work of the nature and kind Desper was performing in the instant case, are properly compensable under state workmen's compensation laws and that jurisdiction is properly before the state industrial commission. See *Bethlehem Steel Co.* v. *Moore,* 335 U.S. 874, affirming *Moore's* case, 323 Mass. 462, and *Baskin* v. *Industrial Accident Commission,* 338 U.S. 854, vacating the judgment entered in *Baskin* v. *Industrial Accident Commission,* 89 Cal. App. 632, and remanding the cause for reconsideration, which was later given in *Baskin* v. *Industrial Accident Commission,* 97 Cal. App. (2d) 257 (aff'd. 340 U.S. 886.)

V.

The Decision of the Court of Appeals Is Not in Conflict With the Decisions Cited on Pages 14 to 16 of the Petition.

Hunt v. *United States*, 17 F. Supp. 578, cited on page 15 of the PETITION, was decided before the *Marra* case, but is not inconsistent with it. Hunt was admittedly a seaman; the vessel was tied up awaiting its next voyage, and moreover, Hunt "slept and ate on the boat, was subject to discipline demanded and the orders and directions given by the master and/or chief officer directly, or through the boatswain." Under the record in the instant case there was no ship's discipline; there was no master; there was no chief officer; there was no boatswain, and Desper neither slept nor ate on any vessel but instead lived at his home.

Moreover as the Court of Appeals said, the *Hunt* case "merely serves to emphasize the factors, lacking in the case at bar, which serve to make one a seaman for the purposes of the Act."

United States v. *Lindgren*, 28 F. 2d 275, referred to on page 15 of the PETITION, is not in point for at least two reasons: *First*, it was admitted by the pleadings in such cited case that the decedent, who was signed as third mate, was a seaman, and *second*, the court relied principally on the *Haverty* case as precedent for its decision, a case which no longer is an authority on the point here at issue.

Jones v. *Shepard*, 20 F. Supp. 345,—a District Court opinion which was not appealed—is also cited on page 15 of the PETITION. There, apparently, the deceased was

recalled *as a member of the crew* the day before the ship was to sail and on that date was killed. He was and had been doing work that a roustabout would do, whether or not the vessel was in motion. Such a case is not authority in the instant case where, according to the record, Desper was hired to do "general labor." (Rec. 87.)

It may be pertinent to observe that the *Hunt*, *Lindgren* and *Jones* cases are all cited in *Weaver* v. *Pittsburgh Steamship Co.*, 153 F. 2d 597, also cited on page 15 of the PETITION. The *Weaver* case arose under the Fair Labor Standards Act. Thus, it does not involve the Jones Act, the Longshoremen's Act, or even an ordinary libel. The distinction between the cases petitioner cites and the one at bar is aptly illustrated by the language of the court in the *Weaver* case (page 601 of the report) in distinguishing it from the *Taylor* and *Antus* cases.

Petitioner also relies on *Daffin* v. *Pape*, 170 F. 2d 622, which is purportedly summarized on page 15 of the PETITION. Such cited case is directly in point on the proposition elsewhere herein urged by the respondent, namely that the character of the work being done at the time of the injury determines the injured's status as a seaman. In the *Daffin* case the Court of Appeals flatly rejected the contention that the general character of the deceased's employment rather than its nature when he was fatally injured should determine whether the Jones Act afforded a remedy. The following quotations from the opinion are on that point:

> (P. 624) "We think it clear from the *Warner Co.* case (*Norton* v. *Warner Co.*, 321 U.S. 565) that, *since the facts having to do with the services Daffin was performing on the yacht at the time of the injury* are undisputed, the question whether he was a mem-

ber of the crew * * * is a question of law * * *. The yacht *at the time* was in port, yet it nevertheless must be considered to have been in navigation, for it remained in readiness for another voyage.

(P. 625) "* * * *The employee's duties on the day of the accident are the critical facts which should determine his status as a member of the tug's crew.* It is true that if he had been called aboard for a single act of service, he might not become a member of the crew. But on the days when his employer assigned him to serve as a 'mate' of the vessel, we hold that he was a crew member, although he might cease to be one on days when he was assigned for other duties. See to the same effect *Maryland Casualty Co.* v. *Lawson*, 5 Cir., 94 F. 2d 190; *Osland* v. *Star Fish & Oyster Co.*, 5 Cir., 107 F. 2d 113." (Emphasis supplied.)

Conclusion.

No substantial questions are raised in the PETITION which have not heretofore been settled and decided by this Court adversely to the petitioner's contentions. The decisions of the several Courts of Appeals are not in conflict, but on the contrary, all are in accord with the opinion filed in this case. Desper was not a seaman within the meaning of the Jones Act; he was not attached to any vessel; he was not engaged in navigation upon navigable waters; he had not signed ship's articles; he was not subject to ship's discipline; there were no master, mates, or other ship's officers, and Desper was not

furnished maintenance, cure, lodging or sustenance. The PETITION for WRIT of CERTIORARI should be denied.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951.

No. 231

ANNA DESPER, ADMINISTRATRIX OF THE ESTATE OF THOMAS J. DESPER, JR., DECEASED,
Petitioner,

vs.

STARVED ROCK FERRY COMPANY,
A CORPORATION,
Respondent.

RESPONDENT'S BRIEF ON WRIT OF CERTIORARI.

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INDEX.

PAGE

Argument 13

I. The word "seaman" as used in the Jones Act, means a member of a crew of a vessel plying navigable waters 13

II. The contention that an ordinary land laborer, assisting in the preparation of boats for navigation, is a member of a crew merely because he had been in the past and might be in the future cannot be sustained 17

(a) Whether one is a member of a crew is determined by the nature of the services performed by him 17

(b) Persons rendering services to vessels not in navigation at the time are not deemed members of a crew of a vessel 25

III. To constitute one a member of a crew there must be a relationship to a vessel and it must ply in navigable waters 29

(a) The launches being conditioned for the season were on dry land 30

(b) The barges were not "vessels" in legal contemplation 31

(c) The shallow, non-navigable waters of an inlet—such as Edwards Run in the instant case—are not navigable waters of the United States 34

IV. The 1939 Amendment to the Federal Employers' Liability Act is wholly inapplicable in determining whether Desper was a seaman within the meaning of the Jones Act 36

V. The decision of the Court of Appeals is not in conflict with the cases cited by petitioner 44

VI. The State of Illinois, under the circumstances existing in the instant case, may validly and properly assume jurisdiction over the claims filed by the parties under the provisions of the Illinois Workmen's Compensation Act.... 48

Jurisdictional Statement 2

Opinion below 1

Statement of Facts 2

Summary of Argument 12

TABLE OF CASES.

Allisot v. Federal Shipbuilding & Dry Dock Co., 4 N.J. 445 50

Antus v. Interocean S.S. Co., 108 F. 2d 185 ..... 25, 45

Barnsdall Refining Corp. v. Cushman-Wilson Oil Co., 97 F. 2d 481 39

Baskin v. Industrial Accident Commission, 89 Cal. App. (2d) 632, 97 Cal. App. (2d) 257 ..... 48, 49, 50

Baskin v. Industrial Accident Commission, 388 U.S. 854 48

Beddoo v. Smoot Sand & Gravel Corporation, 128 F. 2d 608 35

Berton v. Tientjen & Lang Dry Dock Co., 219 Fed. 763 33

Bethlehem Steel Co. v. Moore, 335 U.S. 874 48

Buzynski v. Luckenbach S.S. Co., 277 U.S. 226 14

Carvalho v. Fregata, 42 F. Supp. 404 47

Chisholm v. Cherokee-Seminole S.S. Corp., 36 F. Supp. 967 41

Colonna's Shipyard v. Lowe, 22 F. 2d 843 31

Cope v. Vallette Dry Dock Co., 119 U.S. 625 32

Daffin v. Pape, 170 F. 2d 622 46

Davis v. Department of Labor and Industries of Washington, 317 U.S. 249 49

DeGraw v. Todd Shipyards, 134 N.J.L. 315; cert. denied *ri sub nomine*, Todd Shipyards Corp. v. DeGraw, 329 U.S. 759 50

DeWald v. Baltimore & O. R. Co., 71 F. 2d 810 22

Diomede v. Lowe, 87 F. 2d 296 22

Emmons v. Pacific Indemnity Co., 146 Tex. 496 50

Evansville & Bowling Greens Packet Co. v. Chero Cola Bottling Co., 271 U.S. 19 32

Farrington v. Commissioner of Internal Revenue, 30 F. 2d 915 39

Gadd v. McGuire, 69 Cal. App. 347 37

Gonzales v. United States, 3 F. 2d 168 28

Gonzalez v. Riverside & Fort Lee Ferry Co., 43 F. Supp. 366 45

Hagens v. United Fruit Co., 135 F. 2d 842 23

Hawn v. America S.S. Co., 107 F. 2d 999 ..... 28, 34

Hayford v. Doussony, 32 F. 2d 605 33

Henderson v. Jones, 110 F. 2d 952 22

Hunt v. United States, 17 F. Supp. 578 ..... 44, 45

International Stevedoring Co. v. Haverty, 272 U.S. 50 ..... 14, 25, 45

Jones v. Shepard, 20 F. Supp. 345 46

Jones, et al. v. Dexter, Adm. et al., 8 Fla. 276 37

Leovy v. United States, 177 U.S. 621 34

Long Island R. Co. v. Lowe, 145 F. 2d 516 26

Mamat v. United Fruit Co., 39 F. Supp. 103 ..... 26, 45

Mintzer v. North American Dredging Co., 242 Fed. 553, aff'd. 245 Fed. 297 35

Moore Dry Dock Co. v. Pillsbury, 100 F. 2d 245 22

Moore's case, 323 Mass. 462 ..... 48, 49, 50

National Zinc Company v. Industrial Com., 292 Ill. 598 10

Nordquist v. U.S. Trust Co., 188 F. 2d 776 41

Norton v. Vesta Coal Co., 63 F. 2d 165 31

Norton v. Warner Co., 321 U.S. 565 23

O'Donnell v. Great Lakes Dredge & Dock Co., 318 U.S. 36 ..... 15, 38, 42

O'Hara's case, 249 Mass. 31 ..... 30, 49

Overstreet v. North Shore Corp., 318 U.S. 125 41

Petition of Spearin, Preston & Burrows, 190 F. 2d 684 23

Pritchard v. Norton, 106 U.S. 124 41

Rohlfs v. Dept. of Labor and Industries, 190 Wash. 566 31

Schantz v. American Dredging Co., 138 F. 2d 534 23
Seneca Washed Gravel Co. v. McManigal, 65 F. 2d 779 27
South Chicago Coal and Dock Co. v. Bassett, 309 U.S. 251 ..... 14, 15, 20, 44, 45
Spencer & Son Corp. v. Lowe, 152 F. 2d 847 23
Spinner v. Waterway Fuel and Dock Co., 70 Ohio App. 121 31
State v. Board of Commissioners, 170 Ind. 595 37
State v. Board of Commissioners, 83 Kan. 199 37
State v. Board of Commissioners, 175 Ind. 400 37
State v. Frear, 144 Wis. 79 36
Swanson v. Marra Bros., 328 U.S. 1 ..... 15, 20, 25, 34, 42
Taylor v. McManigal, 89 F. 2d 583 ..... 23, 27, 45
The Arizona v. Anglich, 298 U.S. 110 ..... 37, 39
The Hendrich Hudson, 11 Fed. cases, p. 1085, Fed. Cas. No. 6355 33
Toledo Liberal Shooting Club v. Erie Shooting Club, 90 Fed. 680 35
Union Oil Co. v. Pillsbury, 63 F. 2d 925 29
United States v. Lingren, 28 F. 2d 275 45
United States v. Oregon, 295 U.S. 1 35
United States v. Rio Grande Dam Irrigation Co., 174 U.S. 690 35
W. F. & R. Boat Builders v. Hudson River Steamboat Co., 9 F. Supp. 932 33
Weaver v. Pittsburgh Steamship Co., 153 F. 2d 597 ..... 19, 46

STATUTES.

Longshoremen's and Harbor Workers' Compensation Act, (44 Stat. 1424, 33 U.S.C., sec. 901, et seq.) 14, 20, 30, 42, 43, 45

The Federal Employers' Liability Act (35 Stat. 65, 45 U.S.C. sec. 51) 38, 40, 41

The Jones Act, (41 Stat. 1007, 46 U.S.C. sec. 688) 13, 14, 15, 27, 28, 29, 36, 37, 38, 40, 41, 42, 43, 45, 46, 51

1939 Amendment to the Federal Employers' Liability Act (53 Stat. 1404, 45 U.S.C. sec. 51) 36, 37, 38, 39, 40, 41, 42, 43, 44

MISCELLANEOUS.

2 Lewis' Sutherland on Statutory Construction, sec. 405 ..... 37, 39

Senate Report No. 94, 67th Congress, First Session 16

Senate Report No. 661, 76th Congress, First Session 38

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951.

No. 231

ANNA DESPER, ADMINISTRATRIX OF THE ESTATE OF THOMAS J. DESPER, JR., DECEASED,

Petitioner,

VS.

STARVED ROCK FERRY COMPANY, A CORPORATION,

Respondent.

RESPONDENT'S BRIEF ON WRIT OF CERTIORARI.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Opinion Below.

The opinion of the Court of Appeals is reported in 188 F. 2d 177; it will also be found at R. 274-282.

Jurisdictional Statement.

This Court's jurisdiction has been invoked by petitioner under 62 Stat. 928, 28 U. S. C. A. Sec. 1254. The judgment is a decision as to rights claimed by petitioner under the Jones Act, 41 Stat. 1007, 46 U. S. C. A. Sec. 688.

Statement of Facts.

This case arises from a suit filed under the Jones Act against the respondent for damages for fatal injuries sustained by petitioner's intestate in the State of Illinois in the course of his employment. At the time of the accident, respondent and all its employees were bound by and subject to the Workmen's Compensation Act of Illinois, which respondent pleaded in defense to the suit, and which defense the trial court overruled. The case was submitted to the jury, a verdict rendered for petitioner and judgment entered thereon. The Court of Appeals reversed the judgment and remanded the cause with directions to enter judgment for the respondent.

Starved Rock Ferry Company, respondent herein, owned and during the summer months of each year operated ferry boats on short sight-seeing trips—the round trip taking about one hour and twenty minutes—on the Illinois River in the vicinity of Starved Rock in the State of Illinois. (R. 62, 101, 103, 104.)

The equipment of the respondent consisted of five gasoline-powered flat-bottomed ferry boats and three barges which had no motive power. (R. 101, 103.)

In the operation of its five sight-seeing passenger ferry boats during the summer months, respondent also used

the three barges. (R. 103.) The three barges had no engines or propellers and during the summer season when respondent's sight-seeing passenger boats were in operation on the Illinois River, the barges were anchored by cables to the shore and were used as landing docks remaining stationary throughout the season. (R. 84, 88, 103.)

The five ferry boats were each operated by only one man and in the 1947 season, respondent had three operators; however, none of the operators was especially assigned to any one boat. (R. 101.) They had a draft of about two to two and one-half feet, were about fifty-five to sixty feet in length and had a tonnage displacement ranging from five to fifteen tons. (R. 62, 101, 103, 109, 110.)

The largest of the three barges was used by respondent during the summer season as a ticket office, waiting room, machine and tool shop. (R. 89, 128, 228, 229.) This barge was wooden with a flat bottom and was about twenty-six feet wide, one hundred ten feet long and sixteen feet high. It had two stories and the second floor was an apartment in which one Claudnic, then respondent's manager, with his wife had lived continuously both winter and summer for some nine years. (R. 89, 128, 129, 130, 131.) This houseboat barge had no engine, propeller, whistle, bell or steering apparatus. (R. 129.) It had no means of generating electricity but obtained current and water from land connections. (R. 84, 131.)

The other two barges had single decks and had no special equipment of any kind on board.

During the summer season respondent in the operation of its sight-seeing ferry boats was required to observe

the regulations of the United States Coast Guard Regulations (R. 104, 122), and each of the men who operated a sight-seeing ferry boat was required to have an operator's license which certified the holder of such license could operate motor boats under sixty-five feet in length carrying passengers for hire on the navigable waters of the United States. (R. 101, 104, 132, 224.) Such license as was required by United States Coast Guard Regulations for the operation of respondent's sight-seeing ferry boats was not a pilot's license but was merely a motor boat operator's license. (R. 149.) None of respondent's employees was a pilot. (R. 101.)

From the evidence it seems there is a great difference between an operator's license and a pilot's license. A pilot's license pertains to a certain section or sections of navigable waters with which the pilot is familiar; whereas, an operator's license is good anywhere and simply means the operator knows how to run a motor boat. (R. 132.) In addition, when the boats were operated during the summer season they were required to meet certain Coast Guard requirements as to running lights, life preservers and fire extinguishers. (R. 68, 105, 137, 173.)

In order to move the three barges over the water of Edwards Run at the close of the summer season, upon notification to the personnel located at the dam some six miles west, which was a step-by-step lock dam controlling water elevation, the locks would be operated so as to raise the water in Edwards Run approximately eight inches above its average two foot depth, so that defendant's three barges and five sight-seeing ferry boats could be brought into Edwards Run which was used as winter quarters and which sometimes was re-

ferred to as Buffalo Rock Boat Yard. (R. 50, 126, 127, 137, 144, 169.)

There the five boats would be taken out of the water and blocked up on marine tracks in the adjacent Buffalo Rock Boatyard. (R. 126, 130.) The three barges were left in Edwards Run and the largest of the three barges was anchored to the bank by means of spud spars and cables and sometimes during the winter months it floated and sometimes it rested in the mud. (R. 107, 130.) During the winter the two smaller barges were fastened to the large barge. (R. 107.)

Edwards Run at one time was a creek known as County House Creek which emptied into the Illinois River. The land originally on either side of the creek was used as pasture and farm land. (R. 169, 170.) After the Starved Rock dam, some six miles to the west was built—variously estimated by the witnesses as being sometime between 1930 and 1933—the water of the Illinois River was raised and what previously was County House Creek became Edwards Run. (R. 50, 131, 145, 171.)

Edwards Run was undredged and was not over two feet deep at its deepest spot. (R. 57, 105, 127.) The water was filled with a considerable growth of weeds and its depth varied only in springtime when the floods came. (R. 128, 136.) It was not deep enough for a tugboat to enter. (R. 107.) Rowboats could be and were used in it for duck hunting, but rowboats with outboard motors had to enter it carefully and go very slowly or they would hit some obstruction and shear their steering pin. (R. 59, 128.) No other boats ever used the water except those of the respondent. (R. 57, 169.)

To the west of Edwards Run was another inlet body of water which merged into the Illinois River at almost

the same point as did Edwards Run. This other inlet body of water was known as Consumers Run and was used by the Consumers Company to haul gravel from an island in the middle of the river on barges to a railroad spur track at the upper or north end of Consumers Run. (R. 53, 114.) Consumers Run was about five feet in depth. (R. 105.) Consumers Run was not in any way connected with Edwards Run but was a separate body of water except the two inlets—Consumers Run and Edwards Run—merged at the edge of the Illinois River. (R. 132, 136.) The Consumers Company dredged Consumers Run about every other year. (R. 124.)

With the opening of the summer season, the sightseeing boats had to be jacked up, timbers removed, dollies placed under them and then moved by dollies over the marine tracks into Consumer's Run and thence to the Illinois River. (R. 53, 67, 78, 92.) The barges would be floated out of the Edwards Run inlet to serve again as ticket office and landing docks. (R. 84, 88, 89, 103, 127, 128, 228, 229.)

Petitioner's decedent had worked for respondent in 1947 from April 3 until December 19. (R. 86, 117.) After having left school he had worked as an arc welder in the Seneca Ship Yards. (R. 86.) After working as a welder for approximately three years he had been a truck driver in the Army for a little more than two years. (R. 86.) After he came out of service with the Army, he started as a welder for the Meyer Furnace Company where he suffered a broken foot. (R. 86.) He next started working for respondent in April 1947. (R. 86.) While working for respondent in 1947, petitioner's decedent did all kinds of general labor and helped with the outfitting and preparation work getting the boats

ready for the summer season, which lasted from June 1 until the end of October. (R. 101, 118.) In June 1947, he obtained a license to operator motor boats carrying passengers for hire from the United States Department of Commerce, Bureau of Marine Inspection and Navigation. (R. 87, 150, 224.) After having received such license, Tom Desper operated respondent's sight-seeing boats and also did other general maintenance work for the respondent (R. 102, 105, 129); however, no special boat was ever assigned to him. (R. 101.)

During the interim following the close of the 1947 season at the end of October until his employment for the year terminated December 19, Tom Desper helped in the work of taking the boats out of the water preparing them for winter. (R. 87.) There is no record of his having done any work of any nature between December 19, 1947, and March 15, 1948, when he again began working for respondent. (R. 89, 122, 166.)

After beginning work for respondent March 15, 1948, Tom Desper assisted in the general work of cleaning, priming the metal, painting, varnishing and water-proofing the sight-seeing boats which were standing blocked on timbers on the marine rail track. He helped with whatever work there was to be done including helping fabricate a boat which was being rebuilt, assisted in welding, and did other general work. (R. 61, 62, 109, 138, 139.) While working for respondent, the decedent lived at home with his parents and other members of his family. (R. 163, 164, 165.)

None of the work being done on the boats during the month of April 1948 required a license of any kind from the Coast Guard, the Department of Commerce or from any other department of the Federal Government. (R.

132.) There were no Coast Guard regulations regarding the respondent's three barges or the passenger sightseeing boats when they were in winter quarters in Edwards Run. (R. 132, 137.)

On April 26, 1948, the day on which the accident occurred, the five motor launches were resting on the rails blocked up on timbers. (R. 67, 92.) (Respondent's Exhibit No. 15 is helpfully illustrative—R. 177, 336.) The three barges were lying in Edwards Run. None of the witnesses could say whether the bottom of the houseboat barge was resting on the bottom of the inlet or was afloat on its shallow water. (R. 77, 78.)

On April 26, 1948, five or six men, including respondent's president, Charles Birkenbuel, Tom and James Desper, respondent's manager, Claudnic, Robert Kennedy, and Michael Lewis comprised the working force. (R. 61, 62, 64.) All of these men, were working on the houseboat barge. Kennedy and the other men assisting him—Lewis and the two Despers—were working at reconditioning life preservers which were intended to be placed on respondent's boats. (R. 68, 83, 93, 173, 120.)

While the men were thus engaged respondent's president, Birkenbuel, was working on a fire extinguisher, one of five respondent had purchased intending to place one in each of the five sight-seeing boats. (R. 68, 69, 111, 112.) Neither the life preservers on which the men were working, nor the fire extinguishers were to be used on the houseboat barge where the work was being done. (R. 133.) Suddenly the fire extinguisher on which respondent's president, Birkenbuel, was working exploded killing both him and petitioner's intestate. (R. 72, 94, 150.)

On the hereinbefore mentioned and described house-boat barge where the fatal accident occurred there was no ship discipline or regulations and the men worked the same as they would in a factory or any other place. (R. 182.)

On April 26, 1948, the date of the accident, the work of getting the respondent's boats ready for the summer season was about three-fourths completed. (R. 109, 120.) Respondent's manager, Claudnic, testified there was about three weeks more work to be done on the boats (R. 109), and that the boats went into the water and began operations May 9, 1949. (R. 181.) Kennedy who had been hired by respondent to do the painting job on the boats testified he finished his work between May 18 and May 21, 1948, (R. 61, 160), and as previously stated, at the time of the accident respondent's five passenger sight-seeing boats were still on the marine rails resting on wooden blocks or timbers. (R. 64, 92.)

Respondent's president, Birkenbuel, who was killed in the same accident with Tom Desper, had hired the latter to work in 1948. The hiring was verbal and Claudnic, respondent's manager, testified he did not know the terms of the arrangements between Birkenbuel and the deceased, Tom Desper, though at one point in his testimony, Claudnic, when asked if he did not know Tom Desper had been hired to help get the boats prepared for operation in 1948 and then to work as an operator when the boats were in the water, answered affirmatively. (R. 110, 133.) He further testified that so far as he knew none of the employees was under contract for a certain time. (R. 133, 135.)

Claudnic also testified the men could leave any time they wanted and that if Birkenbuel "found something

that went wrong and he wanted to get rid of him, he could," but that if a man did his work satisfactorily he probably would be hired for the season (R. 135, 136); that, if available it was the usual practice of the respondent to take back the operators they had had the season before (R. 119), and that so far as he knew, Tom Desper was to be used as an operator during the 1948 season. (R. 180.)

Petitioner made no effort to prove that decedent had signed seaman's articles in connection with his work for defendant, and an examination of the books and records in defendant's office after the accident disclosed no such papers or documents. (R. 134.)

Prior to April 26, 1948, the respondent had elected to conduct and operate its business and employment under and pursuant to the terms and provisions of the Workmen's Compensation Act of Illinois. (R. 26.) Such election was in full force and effect on the 26th day of April, 1948 (R. 26), and the injuries sustained by the petitioner's intestate resulting in his death were accidental and arose out of and in the course of his employment by the respondent. (R. 37.)

On January 6, 1949, the respondent filed an application for adjustment of claim with the Industrial Commission to have the rights of the parties determined under the Workmen's Compensation Act of Illinois which under the laws of Illinois as it had a legal right to do. (*National Zinc Company* v. *Industrial Com.*, 292 Ill. 598). On March 29, 1949, Anna Desper, mother of the decedent, for herself and as mother and next friend of Katherine Desper, minor sister of decedent, also filed an application for adjustment of claim with the Industrial Commission of Illinois. (R. 15, 27.)

On July 28, 1949, after due notice to the parties' attorneys, a hearing was had before an arbitrator designated by the Industrial Commission on the application for adjustment of claim filed with the Industrial Commission by Anna Desper, mother of the deceased Thomas Desper, and on the application for adjustment of claim filed with the Industrial Commission by the respondent. (R. 18.)

At the hearing held July 28, 1949, on the said application for adjustment of claim, the parties were represented by counsel and Anna Desper, mother of the deceased Thomas Desper, was present and testified as did other witnesses concerning the issues presented in the case. (R. 28.)

Thereafter, on December 9, 1949, after consideration of the evidence and after submission to him of a memorandum of authorities by the respondent, the arbitrator entered his decision finding among other things that the petitioner's decedent, Thomas Desper, and Starved Rock Ferry Company, respondent herein, were operating under and subject to the terms and provisions of the Workmen's Compensation Act of Illinois on April 26, 1949—the date of the said Thomas Desper's fatal accident; that the said Thomas Desper did on such last-mentioned date sustain accidental injuries which did arise out of and in the course of his employment with the respondent, and the arbitrator ordered that compensation be paid the said Anna Desper by Starved Rock Ferry Company, respondent herein, in the sum of $19.50 per week for a period of 266 weeks and one week at $13.00 as is provided in paragraph (b) of section 7 of the Workmen's Compensation Act of Illinois. (Ill. Rev. Stat. 1949, Ch. 48, sec. 144(b)). (R. 19, 29.)

On December 15, 1949, following the entry of the arbitrator's decision, there was tendered to Anna Desper in accordance with the terms of said decision, the sum of $1716.00, the amount of the compensation which had then accrued, with the further offer by Starved Rock Ferry Company, respondent herein, to pay the remainder of the award—$3,484.00—either in installments or in a lump sum just as the said Anna Desper preferred, but this offer was rejected by the latter's counsel. (R. 20, 21, 30, 31.)

On December 16, 1949, there was filed with the Industrial Commission on behalf of the said Anna Desper, a petition for review of the arbitrator's decision which petition is still pending and at the present time remains undetermined. (R. 22, 23, 31.)

Summary of Argument.

The Jones Act is applicable only to members of the crew of a vessel plying in navigable waters. One who is engaged in conditioning a motor launch or its equipment, when the said launch is on dry land for later use on navigable waters, is not a member of a crew of such launch even though he might have operated it when it was later placed into the water. Such an employee is a shore worker and may recover for accidental injuries sustained in the course of his employment under the Workmen's Compensation Act of the State.

The 1939 amendment to the Federal Employers' Liability Act did not extend the provisions of the Jones Act so as to include shore workers even though the work performed by them did further future navigation.

Where, as in this case, the services were not rendered to a vessel in navigation and where the injury did not occur on a vessel on navigable waters there cannot be a recovery under the Jones Act.

ARGUMENT.

I.

The word "seaman", as used in the Jones Act, means a member of a crew of a vessel plying navigable waters.

It was incumbent upon the petitioner to prove, among other things, that decedent was a seaman as such word is used in the Jones Act.[1] "Seaman" may be stated succinctly to mean the master or a member of a crew of a vessel plying in navigable waters. The present inquiry may be confined to the definition of the word as it pertains to the members of a crew of a vessel; petitioner has nowhere seriously contended that the injury causing the death of decedent occurred on navigable waters.

In several cases decided in recent years this Court has stated in some detail the development of case and

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1 THE JONES ACT (41 Stat. 1007, 46 U.S.C. sec. 688):

"Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury and in such action all statutes of the United States modifying or extending the common law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located."

statutory maritime law. Briefly, the Jones Act was enacted in 1920 after decisions by this Court holding that longshoremen, harbor workers, stevedores, and crew members injured upon navigable waters were not within the provisions of the Workmen's Compensation Laws of the several states. Later, these workmen were declared to be seamen within the meaning of the Jones Act and entitled to maintain actions under its provisions. (*International Stevedoring Co.* v. *Haverty*, 272 U. S. 50, 52, and *Buzynski* v. *Luckenbach S. S. Co.*, 277 U.S. 226, 228.)

In 1927, after the decisions cited above, Congress enacted the Longshoremen's and Harbor Workers' Compensation Act.[2] (44 Stat. 1426.)

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2. SEC. 2. "When used in this Act—

* * *

(3) The term 'employee' does not include a master or member of a crew of any vessel, nor any person engaged by the master to load or unload or repair any small vessel under eighteen tons net.

(4) The term 'employer' means an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any dry dock)."

* * *

"SEC. 3. (a) Compensation shall be payable under this Act in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law. No compensation shall be payable in respect of the disability or death of—

(1) A master or member of a crew of any vessel nor any person engaged by the master to load or unload or repair any small vessel under eighteen tons net; or

* * *

This Court considered the Congressional intent and the policy underlying the Longshoremen's Act in *South Chicago Coal and Dock Co.* v. *Bassett,* 309 U.S. 251, 256, and declared that because of the enactment of such Act the meaning of the word "seaman", as used in the Jones Act, was narrowed from the interpretation announced in the *Haverty* opinion to exclude all "those various sorts of longshoremen and harbor workers who were performing labor on a vessel and to whom state compensation acts were inapplicable."

Following the decision in the *Bassett* case, the significance of the word "seaman" and jurisdiction under the Jones Act have been defined and delineated in two very important decisions. The first such case is *O'Donnell* v. *Great Lakes Dredge & Dock Co.,* 318 U.S. 26, where the Court said (p. 42):

> "The right of recovery in the Jones Act is given to seamen as such and, as in the case of maintenance and cure, the admiralty jurisdiction over the suit depends not on the place where the injury is inflicted *but on the nature of the service and its relationship to the operation of the vessel plying in navigable waters.*" (Emphasis supplied.)

The second important decision directly bearing upon the point now under discussion is *Swanson* v. *Marra Bros.,* 328 U.S. 1. In denying recovery to a longshoreman injured on shore, this Court said (p. 7):

> "We must take it that the effect of these provisions of the Longshoremen's Act is to confine the benefits of the Jones Act to members of the crew of a vessel plying in navigable waters and to substitute for the right of recovery recognized by the *Haverty* case only such rights to compensation as are given by the Longshoremen's Act. But since this Act

is restricted to compensation for injuries occurring on navigable waters, it excludes from its own terms and from the Jones Act any remedies against the employer for injuries inflicted on shore. The Act leaves the injured employees in such cases to pursue the remedies afforded by the local law, which this Court has often held permits recovery against the employer for injuries inflicted by land torts on his employees who are not members of the crew of a vessel. * * *"

The distinction between members of a crew and the special set of rules governing them and landsmen who work in or about ships is illustrated by a report of the Senate Judiciary Committee, dated June 6, 1921, in connection with legislation concerning stevedores and state compensation statutes, Report No. 94, 67th Congress, First Session. In part, it reads:

"* * * The special treatment which seamen have always had under the acts of Congress was recently emphasized by the provision in the Merchant Marine Act of 1920 extending to seamen but not to other maritime workers the same rights of recovery in case of work accidents now enjoyed by interstate railway employees.

* * *

"Longshoremen and ship-repair men are land workers subject neither to the peculiar conditions nor to the laws which regulate seamen. They form a part of the labor force of each State exactly as other workmen in the ports in which they are employed. They are not migratory but local; their wages, their conditions of living are governed by local standards. They do not in all cases form a special class always employed in this work. The peculiar maritime law, applying to seamen, is inapplicable to their condition and no attempt has been made to apply it to them."

The statements of the law by this Court pertaining to recovery by maritime employees for injuries sustained in the course of their employment in maritime work are definitive, determinative and, of course, authoritative. Respondent earnestly and respectfully submits that the trial judge entirely misconceived this applicable law in including in his charge to the jury instructions Nos. 2 and 3 (R. 209-211; also see *colloquy*, R. 191-196) and in rejecting respondent's tendered suggestion No. 5. (R. 266-7.) Moreover, had the trial court properly understood the law as stated by this Court, he would have allowed respondent's motion for a directed verdict of not guilty (R. 43, 249) or its motion for a judgment notwithstanding the verdict. (R. 251.) These errors were corrected by the Court of Appeals and its judgment should be affirmed.

II.

The contention that an ordinary land laborer assisting in the preparation of boats for navigation is a member of a crew merely because he had been in the past and might be in the future cannot be sustained.

(a) Whether one is a member of a crew is determined by the nature of the services performed by him.

The year before the accident which is the subject matter of this suit Desper worked for the respondent from April 3d until December 10th—approximately eight months. (R. 117.) During that year he did all kinds of general labor work and, after he obtained his operator's license (dated June 17, 1947) he, among other things, operated one of respondent's launches until the season closed at the end of October. (R. 87, 102, 118, 224.) He was unemployed that winter but did, during at least a

part of that time, draw $20 a week compensation from the State. (R. 166.) The decedent returned to his employment with respondent about March 15, 1948. The purpose of his reemployment, stated most favorably to the petitioner, is thus stated in the record:

> "Q. I wish to ask you if you don't know it is a fact that Mr. Birkenbuel reemployed Thomas Desper, Jr., to help get the boats prepared for operation in 1948 and then to go out and work as an operator when the boats were in the water?
>
> "A. Yes." (R. 110.)

The boats went into the water about three weeks after the accident. (R. 109.)

The petitioner repeatedly says in her briefs that her intestate was hired as a seaman; that the work at which he was employed at the time of his death was merely incidental to the dominant purpose of his hiring. The record, however, as quoted above, leaves no doubt that the initial task of employment was to condition the launches and the barges for the summer season. While he might have operated a launch if his employment, which was terminable at will (R. 135, 136), persisted until the opening of the season, such contingency is conjectural. Liability should not be imposed upon such a supposition and it should not be used as a foundation for the determination of Desper's status at the time of the accident.

Petitioner urges that the legal conclusions which may be drawn in this case should be inferred from the alleged dominant purpose of the operation of a launch. That such activity was "dominant" is not only mere rhetoric but it is pure fiction. Why was the operation of a launch more dominant than assistance to the painter,

the machinest, the welder, or the other laborers? The launches could never have been operated upon the river without the prior important, essential and (then) dominant task of preparing them for such operation.

The cases cited on pages 14 and 15 of petitioner's REPLY BRIEF do not support her contention that at the time of the accident Desper's dominant duty was to operate a launch. They hold that if one incidentally performs some duty, contemporaneously in time, in addition to his principal work, such minor deviation from the main job does not require that his status be determined from the nature of the incidental task. Such cited cases do not mean that a court should utterly disregard all of the existing facts and look to something that may or may not be done three weeks in the future to ascertain the then nature of his then employment. If Desper had been injured during the summer season while he was momentarily employed in something other than the operation of a launch (R. 102, 129), perhaps petitioner's argument would have some weight. The distinction is illustrated by the quotation from *Weaver* v. *Pittsburgh Steamship Co.*, (6th Cir.) 153 F. 2d 597, 599 (which petitioner says neither the Court of Appeals nor the respondent commented on—REPLY BRIEF, p. 1):

> "On a special repair job on one of the ships of the appellee company, Rymarkiewicz was employed as a laborer from February 1, 1943, to March 13, 1943. During this particular period, he was not working under Articles. He worked only eight hours per day, five days a week, and for not more than forty hours in any work week. For this work, he was paid at the rate of ninety-three cents per hour. Were the Fair Labor Standards Act applicable to this particular six weeks' work done by Rymarkiewicz, there was actual compliance with the requirements of the Act during such time."

Manifestly, there is no difference between the work Desper was doing at the time of his fatal injury and that undertaken by Rymarkiewicz during the six weeks' period referred to in the court's opinion in the cited case. In each instance, the dominant work was removed from that of a crew member.

The test is the nature of decedent's relationship to a vessel plying in navigable waters and the character of the services rendered to such vessel.

The petitioner argues, beginning on page 1 of her REPLY BRIEF, that navigation is not essential to status as a member of a crew. This Court has repeatedly said that navigation is necessary to establish one as a member of a crew. The petitioner's argument is illustrative of her complete disregard of basic maritime principles in attempting to apply maritime law to the unfavorable facts in this case. From the early cases, some of which are reviewed in *South Chicago Coal & Dock Co.* v. *Bassett*, 309 U.S. 251, 259, to the late *Swanson* case, the meaning of "crew" is summarized as one who serves his ship "in her navigation" and the essentiality of the vessel's "plying in navigable waters" is consistently recognized.

The specific character of the relationship, and the nature of the services essential to constitute one a member of a crew have been subject to judicial interpretation on many occasions by reason of the proviso excepting members of a crew in section 3 of the Longshoremen's and Harbor Workers' Compensation Act (44 Stat. 1424, 33 U.S.C., sec. 901 *et seq.*), so that today there is a substantial body of settled law to which reference may be had on the point.

In the leading case—*South Chicago Coal Co.* v. *Bassett*, 309 U.S. 258—where an employee sustained a fatal accident while at work on a vessel, the court said (p. 260):

> "This (Longshoremen's) Act, as we have seen, was to provide compensation for a class of employees at work on a vessel in navigable waters who, although they might be classed as seamen (*International Stevedoring Co.* v. *Haverty*, 272 U.S. 50, *supra*), were still regarded as distinct from members of a 'crew'. They were persons serving on vessels, to be sure, but their service was that of laborers, of the sort performed by longshoremen and harbor workers and thus distinguished from those employees on the vessel who are naturally and primarily on board to aid in her navigation. See *De Wald* v. *Baltimore & O. R. Co.*, (CCA 4th) 71 F. 2d 810; *Diomede* v. *Lowe*, (CCA 2d) 87 F. 2d 296; *Moore Dry Dock Co.* v. *Pillsbury*, (CCA 9th) 100 F. 2d 245.
>
> "The question concerns his actual duties. These duties, as the Court of Appeals said, did not pertain to navigation, aside from the incidental task of throwing the ship's rope or making the boat fast, a service of the sort which could readily be performed or aided by a harbor worker. What the court considered as supporting the finding of the deputy commissioner was that the primary duty of the decedent was to facilitate the flow of coal to the vessel being fueled, that he had no duties while the boat was in motion, that he slept at home and boarded off ship and was called each day as he was wanted and was paid an hourly wage. Workers of that sort on harbor craft may appropriately be regarded as 'in the position of longshoremen or other casual workers on the water.'"

It is therefore obvious that not every person who renders service on board a vessel is a member of the

crew. Besides the specific nature of the actual work performed, certain other indicia are often considered to assist in determining the line of demarcation between members of a crew and ordinary shore or harbor workers. These indicia are outlined concisely in *Moore Dry Dock Co.* v. *Pillsbury*, (9th Cir.) 100 F. 2d 245, 247, where the court held one is not a member of a crew who is paid on an hourly basis rather than monthly, who neither eats nor sleeps on board a vessel, and who does not surrender his personal rights and liberties as a seaman in exchange for maintenance, care and wages. It should be observed that in this case Desper surrendered no liberties; he was free to terminate his employment at any time. (R. 135.)

So in *Henderson* v. *Jones*, (5th Cir.) 110 F. 2d 952, 953, an employee of a river vessel which was tied up whose duties were to fire a boiler, who had signed no seaman's articles, and who was paid by the hour only for the actual hours worked, and who ate and slept at home and worked only on the days needed, was held not to be a member of the crew.

And in *De Wald* v. *Baltimore & O. R. Co.*, (4th Cir.) 71 F. 2d 810, 813, a claimant whose principal work was in loading and unloading and keeping a record of the cargo, and who occasionally handled a line to make a barge fast at a dock, or to pump water out of it, and who did not live upon the barge but went home every night, was held not to be a member of a crew.

In *Diomede* v. *Lowe*, (2d Cir.) 87 F. 2d 296, upon facts substantially similar to those in the *De Wald* case, except that the claimant lived on the barge, it was held he was not a member of the crew.

The court in referring to the *De Wald* case said (p. 298):

> "The facts of that case are not materially distinguishable from the instant case. There the decedent worked on barges and scows; his employment differed only in two respects. He lived ashore and reported each morning and was given work on an average of three days per week; and the barge or scow did not go beyond Baltimore harbor. The court there held that he was not a member of the crew within the fair and common meaning of the words used in the excepting clause. See, also, *Harper* v. *Parker*, 9 F. Supp. 744 (D.C.D.Md.). The fact that the decedent lived aboard the scow and made trips beyond the harbor limits does not suffice to make him a member of the crew—a seaman within the meaning of the Act; nor does the fact that when outside the harbor limits he was exposed to the perils of the sea."

Many other cases involving the same question may be cited and while absolute agreement in all factual details cannot be expected, in the main the principal test for determining the legal status of a given person on board a vessel, *i.e.* whether or not a member of the crew, is whether his services rendered are chiefly to aid in navigation. *Taylor* v. *McManigal*, (6th Cir.) 89 F. 2d 583, 585; *Norton* v. *Warner Co.*, 321 U.S. 565, 572; *Schantz* v. *American Dredging Co.*, (3d Cir.) 138 F. 2d 534; *Spencer & Son Corp.* v. *Lowe*, (2d Cir.) 152 F. 2d 847, 848; *Hagens* v. *United Fruit Co.*, 2d Cir. 135 F. 2d 842, 843; *Petition of Spearin, Preston & Burrows*, (2d Cir.) 190 F. 2d 684, 687.

In the case at bar, decedent rendered no services in "aid of navigation" as that phrase is defined in the foregoing cases. If the duties and activities of the de-

cedent are considered from the date he began employment in March 1948, until the date of the accident, every service and duty which he performed was that of a shore worker. Despite what his duties might have been in the summer season, no service or duty which he actually did perform at the time of the accident had reference to the present navigation of a vessel or the movement of a vessel; the launches were on dry land and had been there since the previous November. Furthermore, deceased did not eat or sleep on board a vessel; he worked eight hours a day, was paid at an hourly rate, spent all of his time on shore or on the barges and did not incur the hazards of the sea; nor was he subject to ship discipline and he could quit at any time; nor was he assigned to a specific vessel. Neither the work he performed nor his relationship to any vessel was such as to constitute him a member of the crew of any vessel. Unless almost each and every distinction developed in the above-cited cases is to be wholly disregarded, the trial court should have directed a verdict for respondent.

Petitioner refuses to recognize either that the elapse of time or a change in the character and nature of the service which the employee actually performs can have any effect on the question of the determination of whether such employee is a member of a crew. She refuses to acknowledge that a factual change, such as the withdrawal of the boats from navigation, physically removing them from the navigable waters, storing them on dry land and leaving them there, or the severance of all relationship between the boats and those employed on or about them can have any legal effect on the status of those employed about such boats. Acceptance of her

theory requires a complete disregard of all relevant maritime law.

(b) The persons rendering services to vessels not in navigation at the time are not deemed members of a crew of a vessel.

The respondent was engaged in no operations at the time of the accident which can be legally characterized as "navigation." The only services rendered were in preparing the barges and motor launches for the summer. Neither the barges nor the launches had been set in motion, nor were they ready to be set in motion. The launches were still on dry land.

This Court, in *International Stevedoring Co.* v. *Haverty*, 272 U.S. 50, 52, recognized the principle that the actual duties at the time of the occurrence determine the status of the employee. When injured, Haverty, a stevedore, was performing duties *on a vessel in navigable water* such as were traditionally accomplished by seamen. Had he been doing other work at another place, as was the decedent in this case, it is believed that the Court would have reached the same result it did in the *Swanson* case.

In *Antus* v. *Interocean S. S. Co.*, (6th Cir.) 108 F. 2d 185, the accident occurred shortly after the sailing season ended and when the ship was being put in winter quarters; claimant, who had been a member of the crew during the sailing season, had been paid off, but had been retained on board to assist in laying up the vessel, and while doing such work he was hurt.

In holding that at the time of the accident there was no crew on board, the court declared that the fact he had been a member of the crew was of no significance. The court said (p. 187):

"But the question is whether at the time of the accident he was engaged in maritime work and the test is the nature of his employment at that time. While the work done had direct relation to navigation, it neither was performed during the navigation season nor was it even preparatory to navigation. Appellant was laying up the engine and packing the pumps and seacocks so that they would not freeze. He was taking bolts out of the piston-heads, an operation which was never done during navigation. It would have taken from four to eight hours to put the engines together again to operate. The vessel, while not consigned to a ship's graveyard, was tied up to the piles. Instead of doing this work in preparation for navigation, the men were preparing this vessel for winter quarters. *Appellant was not subjected to any maritime hazards. The fact that he had been, or expected in the future to be a seaman does not render maritime work which was not maritime in its nature. The finding of the District Court upon this point was correct, and appellant was not at the time of his injury a seaman. Therefore he was not entitled to sue under section* 688 *of Title* 46, U.S.C., 46 U.S.C.A. 688.

"Neither was appellant at the time of the injury a member of the crew. *The most that may be said is that he* (appellant), with the other men working on the boat, *expected to become members of the crew when it was organized and when the vessel was ready to sail.*" (Emphasis supplied.)

Long Island R. Co. v. *Lowe,* (2d Cir.) 145 F. 2d 516, 518 is peculiarly in point for in such cited case it was held that the Deputy Commissioner erred in taking into consideration the entire period of employment instead of the employees duties on the day of the accident in determining the status of the injured man.

A district court (*Mamat* v. *United Fruit Co.*, (S.D.N.Y.) 39 F. Supp. 103) dismissed a complaint under the Jones Act where a seaman had been discharged as a member of a crew and hired as a member of a shore gang to effect repairs and was not, then, under the direction of a ship officer.

Seneca Washed Gravel Corp. v. *McManigal*, (2d Cir.) 65 F. 2d 779, is also in point. In that case the claimant was a watchman on a vessel which was still in winter quarters at the time that he was injured. The ship was not placed in service until two weeks after the injury. He was held not to be a member of a crew.

The court said (p. 780):

> "While he attended the fires, he clearly was not employed as, nor was he, a member of the crew and he did nothing that assisted in any way the navigation of the ship. *The ship was not placed in the service of navigation until two weeks later.*" (Emphasis supplied.)

Another case controlling on this point is *Taylor* v. *McManigal*, (2d Cir.) 89 F. 2d 583. There the deceased was hired for the season as an assistant engineer on a vessel, but was doing general labor work on the vessel before the season started and as a part of the fitting out work when he was injured. The question arose whether, at the time of the injury, he was a member of the crew.

Holding to the contrary, the court said (p. 585):

> "The deceased was killed while working as a mechanic. He had not assumed the duties of assistant engineer. The most that may be said is that he, with other men working on the boat, expected to become members of the crew when it was organized and when the vessel was ready to sail."

In *Gonzales* v. *United States Shipping Board, E. F. Corp.*, (E.D.N.Y.) 3 F. 2d 168, where injuries were sustained on a vessel which was part of a laid up fleet, it was held that claimant was not a seaman. The test which determines whether they are seamen entitled to sue under the Jones Act is "navigation".

The court said (p. 170):

> "* * * And lacking this important element (navigation) these employees are not seamen, but are workmen employed by the government, and entitled to any and all rights of compensation covered by the said Compensation Act (Comp. St. § 8932a to 8932mm), * * * and, further that the boats of the 'laid-up fleet', on the facts before me, are not 'vessels' within the definition of the Revised Statutes, but are property of the United States, capable of being used as vessels to be sure; but until navigation takes place they are not within said definition."

And in *Hawn* v. *America S. S. Co.*, (2d Cir.) 107 F. 2d 999, arising from a suit under the Jones Act, the injuries occurred aboard a vessel lying in navigable waters which was being used to store grain.

Holding that the vessel, being presently withdrawn from navigation, had no crew, the court stated (p. 1000):

> "Navigation does not cease when the ship is in drydock for repairs awaiting new business * * * *On the other hand, she is withdrawn from navigation if she is laid up for the winter with a ship keeper* * * * The case at bar is between those two; she was not to transport goods but to store them." (Emphasis supplied.)

While a vessel temporarily out of service may be considered still in navigation as where the crew is kept intact and ship discipline observed, nevertheless, where

it is laid up for the winter or for a long period of repairs, its crew discharged and separated, it is then effectively withdrawn from navigation and commerce. *Union Oil Co.* v. *Pillsbury* (9th Cir.) 63 F. 2d 925, 926. Until it is returned to, and again has entered navigation, persons employed about such a vessel cannot be considered as members of a crew, but are merely a gang of shore workers. Here again, it is submitted, in the case at bar, neither the launches nor the barges had a crew, and the foregoing cases should have been controlling on the motion for a directed verdict, and for judgment notwithstanding the verdict.

III.

To constitute one a member of a crew there must be a relationship to a vessel, and it must ply in navigable waters.

It is true that, as the Court of Appeals said, under the *O'Donnell* case recovery may be had under the Jones Act even though the occurrence was on land. However, in the cited case, *there was an existing relationship to the operation of a vessel then plying in navigable waters.* The Federal courts may assume jurisdiction only by reason of the commerce clause of the Constitution or because the case is cognizable in admiralty. (*O'Donnell* v. *Great Lakes Dredge & Dock Co.*, 318 U.S. 36, 39.) There is no proof in the record that the respondent and its employees ever, at any time, engaged in interstate commerce; necessarily, therefore, petitioner must invoke admiralty jurisdiction. To do so, she must show that at the time of the fatality Desper had some connection with the sea. Congress in its authority over the sea cannot intrude upon the authority of the states over the

land with any greater propriety than the states can intrude upon the sea.

(a). The launches being conditioned for the season were on dry land.

On April 26, 1948, the day on which the accident occurred, the five motor launches were on land, resting on the rails of the marine track, blocked up on timbers. (R. 67, 92.) They had been there since the preceding October. (R. 87.) This is said by petitioner to be a "wholly irrelevant factor in determining decedent's status as a seaman." (REPLY BRIEF, p. 7.)

She gives no reason for such an astonishing categorical statement. Indeed, it is believed that none can be given for these are the very vessels in the employment of which she urges Desper was a member of the crew. It is submitted that this is the first time in the history of maritime jurisprudence that it was ever asserted that a vessel *on land* under the circumstances which exist in the instant case had a crew.

Petitioner cites cases which hold that a marine railway is equivalent to a dry dock in actions brought under the Longshoremen's Act. Whether a dry dock is floating or resting upon land is immaterial for maritime jurisdiction to attach. *The essential factor is that the vessel floats into it.* (*O'Hara's* case, 248 Mass. 31, 38.) Such controlling element is not present in the instant case and petitioner's citations cannot supply it. Moreover, in the instant case, the launches were stored on the tracks for the entire winter; they were not there temporarily for inspection of or repairs to their bottoms. (R. 126.) Furthermore, respondent urges that the reasoning in cases

such as *Norton* v. *Vesta Coal Co.*, (3d Cir.) 63 F. 2d 165, 166, *Rohlfs* v. *Dept. of Labor and Industries*, 190 Wash. 566, 570, and *Colonna's Shipyard* v. *Lowe*, (E.D. Va.) 22 F. 2d 843, 844, is far more persuasive than that in the cases petitioner cites in this connection.

To hold that these launches were not on land would be to substitute fiction for fact.

(b) The barges were not "vessels" in legal contemplation.

On the day of the accident and prior thereto only the respondent's barges were lying in Edwards Run. They had no motors, rudders, propellers, sails or means of movement. Part of the time the large houseboat barge on which Claudnic lived with his wife the year round, and on which the fatal accident occurred, rested on the mud, and part of the time it was afloat in the shallow water. It was not then being used, nor was it ever used by the respondent to transport goods or people. It is respectfully submitted that these barges were not vessels in legal contemplation.

Admiralty and maritime law make a distinction between structures that are held to constitute "vessels" and structures which merely float on water; the test is not shape, size, motor power or lack of it, past or future usage of the structure; the test is whether or not there is a present use in navigation and commerce. *Spinner* v. *Waterways Fuel & Dock Co.*, 70 Ohio App. 121, 125. It must be a structure presently used as a device or vehicle to transport goods or people on water. It is a mistake, common enough, to think that anything that floats is necessarily a "vessel" subject to maritime law. Many struc-

tures fastened to shore either permanently or for indefinite periods used not to transport goods or people, but as storage or other purposes, are not vessels. (*Cope* v. *Vallette Dry Dock Co.*, 119 U.S. 625, 627.) Transportation implies motion and carriage and the qualities of motion and carriage from place to place are essential elements or attributes before any floating structure can be held to be a "vessel" in maritime law.

A leading case on the subject is *Evansville & Bowling Greens Packet Co.* v. *Chero Cola Bottling Co.*, 271 U.S. 19, in which the facts bear close parallel to those in the instant case. In such cited case the question arose whether a wharf boat 243 feet long, 48 feet wide and 6 feet in depth lying on the Ohio River was a vessel. During the winter the boat was towed up to the Green River Harbor to protect it from the ice; in the summer it lay at Evansville. The boat contained offices and quarters at one end of the structure for the men in charge. The other part was used to transfer freight from the land to river steamboats and from one steamboat to another and these facts strongly resemble the facts in the case at bar.

In holding that the wharfboat was not a vessel, the Court said (p. 22):

> "The only question presented is whether appellant's wharfboat was a 'vessel' at the time it sank. It was an aid to river traffic, but it was not used to carry freight from one place to another * * * It served at Evansville as an office, warehouse, and wharf, and was not taken from place to place. The connections with the water, electric light, and telephone systems of the city evidence a permanent location. It performed no function that might not have been performed as well by an appropriate

> structure on the land and by a floating stage or platform permanently attached to the land. It did not encounter perils of navigation to which craft used for transportation are exposed. * * * Many cases involving a determination of what constitutes a vessel within the purview of the statute have been before the courts, but no decision has been cited, and we have found none, that supports the contention that this wharfboat was a vessel."

Other cases in point are *The Heindrich Hudson*, 11 Fed. cases, p. 1085, Fed. Cas. No. 6355; *Berton* v. *Tientjen & Lang Dry Dock Co.*, (D.C. N.J.) 219 Fed. 763, 771; *Hayford* v. *Doussony*, (5th Cir.) 32 F. 2d 605, and *W. F. & R. Boatbuilders, Inc.* v. *Hudson River Steamboat Co.*, (E.D. N.Y.) 9 F. Supp. 932, 933.

In the instant case the barge on which the accident occurred, and the other barges, like the structures in the foregoing cited cases, were not conveyances used to move and carry freight or persons. The houseboat barge on which the accident occurred was used as an appendage to the land and was firmly and securely fixed to the shore. In the winter it was firmly and securely attached to the shore in the shallow inlet—Edwards Run. With the opening of the summer season the barge was tied up to the shore at Starved Rock State Park, and after being so tied it remained stationary during the entire summer season. It was not moved but was used as a wharf or dock serving as an office, machine shop, storeroom, and waiting room, just like any wharf or other structure built on land. It lacked the essential characteristics of motion and carriage on water.

The barges not being vessels in legal contemplation, a person employed to work on and about them is not a member of a crew of a vessel, and as to any injuries

sustained by such person, the martime law does not apply. (*Hawn* v. *American S. S. Co.*, (2d Cir.) 107 F. 2d 999, 1000.

(c) The shallow, non-navigable waters of an inlet—such as Edwards run in the instant case—are not navigable waters of the United States.

The shallow pond in which defendant's three barges lay was not a navigable body of water; consequently, the further requirement of the *Swanson* case, namely, the operation of a vessel in navigable waters is lacking in the instant case.

Navigable waters of the United States are waters which actually carry commerce and navigation, or are capable of so doing in their present or natural state. Whether or not any given body of water is navigable is a question of fact to be proved. The body of water must be shown to be used or of being capable in its present state of being used as a thoroughfare for commerce between two or more of the several states. Edwards Run, the shallow inlet or pond in question, it is earnestly submitted, was not a navigable body of water of the United States, and very clearly was water within the exclusive jurisdiction of the State of Illinois.

The rule which distinguishes navigable waters of the United States from waters under state jurisdiction is clearly stated in *Leovy* v. *United States*; 177 U.S. 621. That case involved a pond or inlet which, as in the case at bar, was formed by overflow waters on some land situated in the State of Louisiana. The inlet, which was called Red Pass, connected with other bodies of water, some of which emptied into the Mississippi River and others into the Gulf of Mexico. Local officials dammed

the mouth of the inlet where it led into the Mississippi, and the question arose whether the body of water called Red Pass was within the jurisdiction of the Federal government or within that of the State of Louisiana. The evidence showed that small craft occasionally navigated the waters of Red Pass passing in and out where it opened into the Mississippi.

Holding that the body of water was not navigable water of the United States, but was subject to the jurisdiction of the State of Louisiana, the Court said (p. 637):

> "However that may be, our conclusion on the record now before us, is that Red Pass, in the condition it was at the time the dam was built, was not shown by adequate evidence to have been a navigable water of the United States."

Other cases in point are *United States* v. *Rio Grande Dam & Irrigation Co.*, 174 U.S. 690, 699; *United States* v. *Oregon*, 295 U.S. 1, 15; *Toledo Liberal Shooting Co.* v. *Erie Shooting Club*, (6th Cir.) 90 Fed. 680, 682; *Mintzer* v. *North American Dredging Co.*, (D.C. Calif.), 242 Fed. 553, 560, aff'd 245 Fed. 297, and *Beddow* v. *Smoot Sand & Gravel Corporation*, (App. D.C.) 128 F. 2d 608, 610.

In the case at bar, Edwards Run, the body of water in which the barges lay, was shown by the evidence to be non-navigable in fact. In origin it was overflowed land, with a depth of about two feet, and in length and width it was approximately 600 feet by 200 feet, with an irregular contour. (R. 50, 131, 145, 171.) It had no defined channel and it contained no docking facilities. (R. 127.) Other than the respondent's barges, no water craft of commercial character ever moved in and out of the inlet (R. 57, 169); the barges were moved in and out once each year and on those occasions, a channel had to be

staked out and the water in the pool behind the dam at Starved Rock had to be raised eight inches to a foot. (R. 50, 126, 127, 137, 144, 169.) The facts show further that a few row boats with fishermen or duck hunters used the inlet, but that because of the very shallow water, the mud and irregular bottom of the basin, outboard motors were unsuitable. (R. 59, 128.) No commerce ever moved over its waters. Edwards Run was not within the admiralty jurisdiction of the Federal government and very clearly a shore-fastened barge lying in it could not be considered as plying navigable waters.

IV.

The 1939 Amendment to the Federal Employers' Liability Act is wholly inapplicable in determining whether Desper was a seaman within the meaning of the Jones Act.

In an attempt to establish liability in the instant case, petitioner resorts to the 1939 Amendment to the Federal Employers' Liability Act.[1] She argues that the Jones Act which provides that in actions brought under such act "all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable" compels a finding that anyone whose work directly or closely and substan-

(1) "Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter." (53 Stat. 1404; 45 U.S.C. sec. 51.)

tially affects navigation is a member of a crew of a vessel in navigation. The assertion on page 17 of the PETITION to the effect that the 1939 Amendment to the Federal Employers' Act is a Congressional mandate which requires a corresponding enlargement in the construction of the Jones Act is simply an assertion which cannot be legally or rationally supported.

The effect of a reference statute is stated in 1 Lewis' Sutherland on Statutory construction, sec. 405, as follows:

> "* * * When, so adopted, only such portion is in force as relates to the particular subject of the adopting act, and as is applicable and appropriate thereto."

Judicial statements of the same rule may be found in *State* v. *Frear*, 144 Wis. 79, 99; *Jones, et al.* v. *Dexter, Adm. et al.*, 8 Fla. 276; *State* v. *Board of Commissioners*, 170 Ind. 595, 619; *Gadd* v. *McGuire*, 69 Cal. App. 347, 369; *State* v. *Board of Commissioners*, 83 Kan. 199, 203, and *State* v. *Board of Commissioners*, 175 Ind. 400, 403.

The precise question was decided by this Court adversely to petitioner's contention in *The Arizona* v. *Anelich*, 298 U.S. 110. In that case, brought under the Jones Act, the defense of assumption of risk was interposed because such defense was then meritorious in an action under the Federal Employers' Liability Act. In holding the defense without merit in a proceeding under maritime law this Court said (p. 123):

> "* * * The denial in the Federal Employer's Liability Act of the defense of assumption of risk refers only to suits founded on the Federal Safety Appliance Act, *applicable alone to railroads*. It can raise no inference as to the availability of the defense in suits brought to recover for injuries to seamen. No provision of the Jones Act is inconsistent

with the admiralty rule as to assumption of risk. The purpose and terms of the Act *and the nature of the juristic field in which it is to be applied,* preclude the assumption that Congress intended, by its adoption, to modify that rule of implication. * * *'" (Emphasis supplied.)

The "juristic field" embraced by the 1939 Amendment to the Federal Employers' Liability Act is succinctly stated in the report of the Senate Judiciary Committee (Senate Bill 1708, Report 661, 76th Congress, 1st Session):

> "This amendment is intended to broaden the scope of the Employers' Liability Act so as to include within its provisions employees of common carriers who, while ordinarily engaged in the transportation of interstate commerce, may be, at the time of injury, temporarily divorced therefrom and engaged in intrastate operations."

However, the "juristic field" of the Jones Act is the one traditionally cognizable in admiralty,—the indemnity afforded by the maritime law to a seaman injured in consequence of the unseaworthiness of the vessel or its tackle. (*O'Donnell* v. *Great Lakes Dredge & Dock Co.*, 318 U.S. 36, 43.)

The procedural rules applicable to proceedings in railroad cases were transferred to and are to be applied to the existing substantive maritime law. But merely because, under the Amendment to the Federal Employers' Liability Act, one whose work directly or closely and substantially affects interstate transportation by rail is entitled to the benefits of the Act, one who is a common laborer on land whose work relates to navigation does not become a member of a crew of a vessel in navigation. To use Sutherland's language, the subjects do not relate to each other, or, as this Court said, the nature

of the juristic fields in which they are to be applied are wholly dissimilar.

In short, no possible distortion of the plain language Congress used in the 1939 Amendment to the Federal Employers' Liability Act can make a seaman out of one who is not a seaman under maritime law. The one Act relates to railroad employees engaged in interstate transportation by rail; the other to seamen as such, whether or not they are engaged in commerce between the states.

It must be presumed that when the 1939 Amendment was enacted, Congress knew of the rule of interpretation stated by Sutherland and applied by this Court in *The Arizona* case. *Farrington* v. *Commissioner of Internal Revenue*, (1st Cir.) 30 F. 2d 915. (Cert. den. 279 U.S. 873.) If Congress had intended a "mandate" such as is contended for, it would have unmistakably said so. Common sense, reason and logic demonstrate that petitioner's position is untenable. Legal precedents, without dissent, reject the highly irrational theory she advances.

The futility of the attempt to apply the 1939 Amendment to the instant case is now recognized by the petitioner by her virtual abandonment of this argument (PETITION, p. 18; Petitioner's REPLY BRIEF, pp. 20, 22). Impliedly, she concedes that she cannot try her case on one theory in the court below and upon another in this Court (*Barnsdall Refining Corp.* v. *Cushman-Wilson Oil Co.*, (8th Cir.) 97 F. 2d 481, 484) for she now says that her theory "was and is that if decedent was hired for the season to operate defendant's boats, and to get them ready for operation, he was a member of the crew not only while he was running the boats but also when he

was doing the fitting out work." (Petitioner's REPLY BRIEF p. 20.)

This same proposition is embraced in instruction No. 3 (R. 210) which was defended in the trial court solely because of the alleged applicability of the 1939 Amendment to the Federal Employers' Liability Act. (R. 193). Instruction No. 2 (R. 209) paraphrases the said amendment so the only instructions tendered by petitioner and given by the trial court embracing the concept of seamen under the Jones Act rest for legal support on the Amendment of 1939.

Moreover, petitioner's objection to respondent's suggested instruction No. 5 (R. 267) was because such instruction ignored the 1939 Amendment. (R. 197, 198.) Further, she stated at the trial (R. 194):

> "The Court: Well, that is their theory of this lawsuit. If they can't sustain that theory, they don't have any lawsuit.
>
> "Mr. Davidson (for petitioner): That is the whole thing in a nutshell."

It is apparent that the entire portion of the trial court's charge concerned with the legal definition of a member of a crew is based solely upon the supposed relevancy of the 1939 Amendment to the Federal Employers Liability Act. How, then, can it be seriously urged that even if the Amendment is inapplicable to Jones Act suits, the error is harmless?

The petitioner suggests that the word "employment" in the two statutes should be identically construed. The one act affords a remedy to *any person* employed by a common carrier by railroad in furthering or substantially affecting interstate commerce whereas the Jones Act

gives a right of action at law to any *seaman* injured in the course of his employment. The problem of whether Desper was a "seaman" within the meaning of the Jones Act can neither be obscured nor solved by a dissertation on the meaning of the word "employment" or by a review of the decided cases construing the phrase "in the course of his employment" or any other words or phrases other than "seaman." Hence *Overstreet* v. *North Shore Corp.*, 318 U. S. 125, and the other cases cited by petitioner on this point can be of no assistance to the Court.

It is urged that because the survival features of the Federal Employers' Liability Act (*Nordquist* v. *U. S. Trust Co.*, (2d. Cir.) 188 F. 2d. 776) and the three year limitation period prescribed by that law (*Chisholm* v. *Cherokee-Seminole S. S. Corp.*, (S.D.N.Y.) 36 F. Supp. 967) apply in Jones Act cases, Desper was a seaman at the time of the fatality.

The Court, in the *Nordquist* case, plainly says that it is reading into the Jones Act words that Congress omitted from it, and that it would not do so except that otherwise the plaintiff would be remediless. In the instant case petitioner is not remediless because she has heretofore recovered under the Workmen's Compensation Law of Illinois and payment of the award has been tendered to her. The doctrine was applied in the cited case by the Court of Appeals for the Second Circuit in that "strictly limited sphere." It is clear that the court would not have extended it to this case.

The statute of limitation cases are not analogous for under English and American law such defense is a matter of procedure. (*Pritchard* v. *Norton*, 106 U. S. 124, 130, 131.) There is no doubt that the procedure of the Federal

Employers' Liability Act governs the administration of the substantive maritime law under the Jones Act. Such question was not even raised in the cases cited by petitioner—in those cases the point at issue was whether the two-year limitation in effect at the time of the enactment of the Jones Act or the three-year limitation provided by the 1939 amendment was to be applied. Moreover, the time in which suit may be commenced by railroad employees and by seamen falls within the same "juristic field" but "railroad employees getting their trains ready for interstate movement and seamen preparing their ships for navigation" (Petitioner's REPLY BRIEF, p. 19) manifestly do not. Desper could have the status of a seaman under the Jones Act only if his activities met the requirements of the legal definition of a member of a crew of a vessel plying navigable waters. This has been fully discussed hereinbefore.

To construe the 1939 Amendment in the manner contended for would, in most instances, effect a judicial repeal of the Longshoremen's Act for, in many respects, longshoremen are seamen and their duties almost invariably further navigation. It is thus necessary to limit the benefits of the Jones Act to members of a crew of a vessel in navigation, as was done in the *O'Donnell* and *Swanson* cases. If such is the seaman's status, the 1939 Amendment neither helps nor hurts him; if it is not his status, to afford him a remedy under the Jones Act is to deprive the seaman who is not a member of a crew of the equal or greater benefits of the Longshoremen's Act and the Workmen's Compensation Acts of the several states. Surely Congress had no such intention when, solely at the behest of the railroad brotherhoods, it enlarged the field of interstate transportation by rail and included

therein railroad employees who theretofore had been without the provisions of the Act.

To give the amendment under discussion the effect petitioner claims, it would be necessary, by construction, to eliminate the words "interstate" and "or foreign" and to substitute the word "navigation" for the word "commerce." Such algebraic process of elimination, subtraction, substitution and addition would constitute unwarranted judicial legislation. Until such time as Congress amends (if it constitutionally can) the Jones Act to extend its benefits to those whose duties "shall be the furtherance of" or shall "in any way directly or closely and substantially affect" navigation, the remedy provided by the Act is available only to members of the crews of vessels in navigation upon navigable waters.

It is only by petitioner's interpolation and substitution of the word navigation for commerce and by analogy that she arrives at her argument. In other words, petitioner does not rely on the 1939 Amendment as enacted by Congress, but on her own private revision of it and on an analogy which she contrives to fit the exigencies of the situation. There is a double evil in this argument, for not only does it require this Court to change fundamental words in the 1939 Amendment, but also to add fundamental words to the Jones Act not presently there. No legal authority supports such procedure and it is submitted it would be giving unwarranted force to use of rhetoric if this attempted construction should be held to repeal the Longshoremen's and Harbor Workers' Act and overrule many decisions of this Court and United States courts of appeals.

Bearing in mind that there is no express language in the 1939 amendment relating to maritime law, it is sub-

mitted that had Congress intended a new and different meaning should be given to the words "seaman" and "employment", and had intended to alter the maritime law, and to overrule the cases cited herein, Congress would have used more direct and express means than concealing within the 1939 Amendment an alleged analogy which petitioner so extensively emphasizes in her briefs.

Finally, it is believed pertinent to observe that in *South Chicago Coal & Dock Co.* v. *Bassett*, 309 U. S. 251, this Court said (p. 259):

> "* * * We find little aid in considering the use of the term 'crew' in other statutes having other purposes. * * *"

If this Court is not assisted by reference to other maritime statutes, how can a law enacted solely for the benefit of railroad employees possibly aid it in determining the status of one as a member of a crew?

V.

The Decision of the Court of Appeals Is Not in Conflict With the Cases Cited by Petitioner.

Hunt v. *United States*, (S.D.N.Y.) 17 F. Supp. 578, cited on page 15 of the PETITION, was decided before the *Marra* case. Hunt was admittedly a seaman and was hired as a member of the crew; the vessel was tied up awaiting its next voyage, and moreover, Hunt "slept and ate on the boat, was subject to discipline demanded and the orders and directions given by the master and/or chief officer directly, or through the boatswain." Under the record in the instant case there was no ship's discipline; there was no master; there was no chief officer, there was no boatswain, and Desper neither slept nor

ate on any vessel but instead lived at his home. The court that decided the *Hunt* case made these same distinctions, in *Mamat* v. *United Fruit Co.*, (S.D.N.Y.), 39 F. Supp. 103 and added that in the case then under consideration the seaman had been discharged as such and rehired as a member of a "shore gang" to effect repairs. That is precisely the situation which obtains in the case at bar—Desper's service as an operator of a launch was terminated at the end of October and from then on such services as he performed were those of a shore worker. That he was paid at the same rate can be of no significance for the nature of the work performed cannot be determined by the amount of pay received. Furthermore, the same court that decided the *Hunt* case, in *Gonzalez* v. *Riverside & Fort Lee Ferry Co.*, (S.D.N.Y.) 43 F. Supp. 366, 367, (decided in 1942), rejected the very argument petitioner makes here—that the fact that the libellant had sometime been a member of a crew and that his work aided navigation entitled him to recover under the Jones Act.

Moreover, as the Court of Appeals said in this case, the *Hunt* case "merely serves to emphasize the factors, lacking in the case at bar, which serve to make one a seaman for the purposes of the Act."

United States v. *Lindgren*, (4th Cir.) 28 F. 2d 275, referred to on page 15 of the PETITION, is not in point for at least two reasons: *First*, it was admitted by the pleadings in such cited case that the decedent, who was signed as third mate, was a seaman, and *second*, the court relied principally on the *Haverty* case as precedent for its decision, a case which is not an authority for the definition of the word "crew", as distinguished from "seaman".

Jones v. *Shepard,* (S.D. Miss.) 20 F. Supp. 345,—a District Court opinion which was not appealed—is also cited on page 15 of the PETITION. There, apparently, the deceased was recalled *as a member of the crew* the day before the ship was to sail and on that date was killed. He was and had been doing work that a roustabout would do, whether or not the vessel was in motion. Such a case is not authority in the instant case where, according to the record, Desper was hired to do "general labor." (R. 87.)

It may be pertinent to observe that the *Hunt, Lindgren* and *Jones* cases are all cited in *Weaver* v. *Pittsburgh Steamship Co.,* (6th Cir.) 153 F. 2d 597, also cited on page 15 of the PETITION. The *Weaver* case arose under the Fair Labor Standards Act. Thus, it does not involve the Jones Act, the Longshoremens Act, or even an ordinary libel. The distinction between the cases petitioner cites and the one at bar is aptly illustrated by the language of the court in the *Weaver* case (page 601 of the report) in distinguishing it from the *Taylor* and *Antus* cases.

Petitioner also relies on *Daffin* v. *Pape,* (5th Cir.) 170 F. 2d 622, which is purportedly summarized on page 15 of the PETITION. Such cited case is directly in point on the proposition elsewhere herein urged by the respondent, namely that the character of the work being done at the time of the injury determines the injured's status as a seaman. In the *Daffin* case the Court of Appeals flatly rejected the contention that the general character of the deceased's employment rather than its nature when he was fatally injured should determine whether the Jones Act afforded a remedy. The following quotations from the opinion are on that point:

(P. 624) "We think it clear from the *Warner Co.* case (*Norton* v. *Warner Co.*, 321 U.S. 565) that, *since the facts having to do with the services Daffin was performing on the yacht at the time of the injury* are undisputed, the question whether he was a member of the crew * * * is a question of law * * *. the yacht *at the time* was in port, yet it nevertheless must be considered to have been in navigation, for it remained in readiness for another voyage.

(P. 625) "* * * *The employee's duties on the day of the accident are the critical facts which should determine his status as a member of the tug's crew.* It is true that if he had been called aboard for a single act of service, he might not become a member of the crew. But on the days when his employer assigned him to serve as a 'mate' of the vessel, we hold that he was a crew member, although he might cease to be one on days when he was assigned for other duties. See to the same effect *Maryland Casualty Co.* v. *Lawson*, 5 Cir., 94 F. 2d 190; *Osland* v. *Star Fish & Oyster Co.*, 5 Cir., 107 F. 2d 113." (Emphasis supplied.)

Carvalho v. *Fregata*, (D.C. Mass.) 42 F. Supp. 404, (Reply Brief, p. 15), is distinguishable because in that case there was *then* a vessel, *then* a crew, the vessel was *then* in navigable waters, and it was found by the court *then* to be in navigation. Any one of these factual differences between the cited case and the instant one is sufficient to distinguish it completely from the case at bar.

VI.

The State of Illinois under the circumstances existing in the instant case may validly and properly assume jurisdiction over the claims filed by the parties under the provisions of the Illinois Workmen's Compensation Act.

Both petitioner and respondent filed application for adjustment of claim with the Industrial Commission of Illinois. (R. 15, 27) A hearing was held before the Industrial Commission on the cause, at which hearing the parties were represented by counsel and at which Anna Desper, mother of the deceased Thomas Desper, was present and testified as did other witnesses concerning the issues in the case. (R. 28.)

An award was entered by the arbitrator in favor of petitioner and a check for the accrued amount of compensation under the terms of the award was tendered to her which tender was refused. (R. 19, 20, 21, 30, 31.)

Under recent holdings of this Court, jurisdiction under a State workmen's compensation law may now be validly and properly taken by a State in cases involving shore workers doing repair on vessels in navigable waters. These cases go much farther than in the instant case where the repair work being done by decedent at the time of the accident was not being performed on navigable waters.

The cases to which reference is here made are *Bethlehem Steel Co.* v. *Moore,* 335 U.S. 874, affirming *Moore's* case, 323 Mass. 162, 165 and *Baskin* v. *Industrial Accident Commission,* 338 U.S. 854, vacating the judgment entered in *Baskin* v. *Industrial Accident Commission,* 89 Cal. App. (2d) 632, which was reconsidered in *Baskin* v. *Industrial Accident Commission,* 97 Cal. App. (2d) 257, 260. (Aff'd 340 U.S. 866.)

In *Moore's* case the employee suffered an injury as the result of slipping on the step of a gun mount while he was aboard a vessel being repaired in a dry dock floating in navigable waters of the United States. The injured employee worked at various tasks on piers, dry docks, and on ships; part of the time he worked on land and part of the time on navigable waters where, as mentioned, the injury occurred. The law of Massachusetts since *O'Hara's* case, 248 Mass. 31, had held that injuries on navigable waters occurring under such circumstances were governed by maritime law.

The Massachusetts court, in its opinion, reviewed the decisions of this Court and concluded that the case of *Davis* v. *Department of Labor and Industries of Washington*, 317 U.S. 249, altered the law as it had been previously interpreted by the Massachusetts court in *O'Hara's* case and concluded that the matter on appeal came within the Workmen's Compensation Law of the Commonwealth.

In *Baskin* v. *Industrial Accident Commission*, 97 Cal. App. (2d) 257, 260, *supra*,—which as above stated was decided on the remanding order of this Court in *Baskin* v. *Industrial Accident Commission*, 338 U.S. 854,—the facts were substantially similar to those in *Moore's* case in that the injured employee went on board a vessel lying in navigable water and being repaired, and while on board the vessel sustained injuries. A claim was filed with and dismissed by the Industrial Commission.

In its opinion, after remandment, the California court said that because of the decision of this Court in *Moore's* case, it was clear that under the *Davis* case the California Commission had jurisdiction to proceed and to determine the merits of the petitioner's application.

Other cases applying the same rule are *Emmons* v. *Pacific Indemnity Co.*, 146 Tex. 496, 502; *De Graw & Todd Shipyards Co.*, 134 N.J.L. 315, 316, cert. denied *ri sub nomine*, 329 U.S. 759, and *Allisot* v. *Federal Ship Building & Dry Dock Co.*, 4 N.J. 445, 453.

In the instant case, Thomas Desper's injury did not occur on navigable water; however, aside from this distinguishing fact which in the light of the decisions in the cases cited under this point makes petitioner's contentions even less tenable, the services rendered by the deceased from the date of his hire—March 15, 1948—until the date of his fatal accident—April 26, 1948—were generally speaking identical with the services being rendered by the employees in the cited cases, *viz.*: repair and conditioning work.

By virtue of its decisions in the *Moore* and *Baskin* cases, this Court has now recognized the right of a state to take jurisdiction over such workers when the injury occurs even on navigable water. How much more impelling reason is there, therefore, to recognize the jurisdiction of the State of Illinois in the instant case where the injury did not take place on navigable waters, and where there was not even a vessel lying in, or plying, navigable waters with reference to which admiralty jurisdiction could attach.

CONCLUSION.

The test which defines a seaman within the meaning of the Jones Act as declared by this Court and the various courts of appeal is that the status depends on the nature of the services rendered as a member of a crew of a vessel plying in navigable waters. It is respectfully submitted that the trial court misconceived the law applicable and erred in instructing the jury, as evidenced in instructions Nos. 1, 2 and 3, in rejecting respondent's tendered instruction No. 5, and in failing to grant respondent's motions for a directed verdict and for judgment notwithstanding the verdict. The Court of Appeals therefore properly reversed the judgment.

If the test is properly applied to the facts of the instant case, then it must follow that (1) the decedent was not a "seaman" within the meaning of the Jones Act; (2) that the nature of the services rendered by decedent at the time in question were not of the character which identify a member of a crew of a vessel; (3) that decedent stood in no relationship to any specific vessel as to which he might be considered a member of the crew; (4) that the decedent was not engaged in navigation at the time of the event in question for the reasons (a) the launches rested on dry land, and (b) the barges and in particular the one on which the injuries occurred were not vessels in contemplation of law, and (5) that the injuries to decedent did not occur on navigable waters for the reason the shallow inlet—Edward's Run—was not navigable water of the United States.

Furthermore, it is respectfully submitted that upon the facts of this case, and under the law as declared by this Court in its very recent decisions, jurisdiction over the injuries, and the rights and liabilities of all the parties resulting from the injuries are properly within the State of Illinois. The award of the arbitrator granting compensation to the decedent's dependent under the Workmen's Compensation Act of Illinois was a valid exercise of State jurisdiction and should have been recognized by the district court below.

It is respectfully submitted that the judgment of the Court of Appeals herein should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1951.

No. 231

ANNA DESPER, Administratrix of the Estate of Thomas J. Desper, Deceased,

Petitioner,

VS.

STARVED ROCK FERRY COMPANY, a corporation,

Respondent.

PETITION FOR REHEARING.

JOSEPH D. RYAN,
Attorney for Petitioner.

CHAMPLIN-SHEALY COMPANY, CHICAGO 388

IN THE

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PETITION FOR REHEARING.

Petitioner respectfully asks that a rehearing be granted in this case. The Court's decision represents a departure from its policy of liberal interpretation of the Jones Act, continuously adhered to since *International Stevedoring Company* v. *Haverty*, 272 U. S. 50. We cannot help feeling that the heavy burden of work imposed upon this Court has prevented a majority of the Justices from giving adequate consideration to this case.

Respondent corporation's sole business and function was to run sightseeing boats, carrying from 55 to 150 passengers, on the Illinois River. Decedent's principal task of operating these boats, as a licensed navigator, was the

very essence of a seaman's work, and everything he did in preparation for it was an essential part of it and of respondent's business. What real difference did it make that he had not yet entered upon the performance of his primary duties? Only those employees who have nothing more than a mere expectation of being hired as crew members when the season begins (*Taylor* v. *McManigal*, 89 Fed. 2d 583, 6th Cir.) can correctly be called expectant seamen. Such designation cannot be given those definitely hired for the season.

In *South Chicago Coal Co.* v. *Bassett*, 309 U. S. 251, 259, 260, this Court held that the employee's primary duties determined whether he was a member of a crew, and if such duties were in aid of navigation, he was a crew member. It was also recognized that the question was essentially one of fact. The primary duties test was adhered to in *Norton* v. *Warner Co.*, 321 U. S. 565. Other courts, including the Court of Appeals for the Second Circuit (*Merritt-Chapman and Scott Corp.* v. *Willard*, 189 F. 2d 791, 792) believe that this Court has made primary duties the test. In the instant decision, this Court has departed from the primary duties test. A number of cases in which the primary duties criterion is applied appear at page 15 of petitioner's reply brief. So tested, decedent's employment clearly appears to be that of a seaman. At the very least, the work decedent was doing at the time of his death cannot be viewed in isolation, without regard to its relation to his primary duties. Since this work was absolutely necessary to the performance of the latter, a jury could reasonably find that decedent was a seaman.

It is said that the work decedent was doing at the time of his death quite clearly was not that usually done by a seaman. This may be true of seamen employed at other times and places, but it was not true of respondent's operators,

who customarily engaged in the fitting out work (Petition page 6). It is stated, also, that in the case of larger vessels, work of this kind is customarily done by exclusively shore-based personnel. But in the case of Great Lakes steamers, it appears to be customary for seamen, whether living on the boats or not, to fit them out. "It is the custom on the Great Lakes for the seamen who sail the ships to fit them out and lay them up. . . ." *Weaver* v. *Pittsburgh Steamship Co.*, 153 F. 2d 597 (6th Cir.) at 599. See also, *Taylor* v. *McManigal*, 89 F. 2d 583 (6th Cir.). And it is not unusual for members of crews of ocean going vessels, laid up in drydock for long periods of repairs, to help in such work. *Hunt* v. *United States*, 17 F. S. 578 (S. D. N. Y.); *United States* v. *Lindgren*, 28 F. 2d 725 (4th Cir.). Especially in view of the fact that this Court has always held (petition page 14) that the repair of a ship, whether afloat, in drydock, or on land, is maritime work, it cannot be said that it is unusual for a seaman to engage in it, particularly where the testimony is to the contrary.

The boats may not have been afloat, as the Court remarks, but they were on a marine track, which is the equivalent of a dry dock (*Cont. Cas. Co.* v. *Lawson*, 64 F. 2d 802, 5th Cir.; *Maryland Cas. Co.* v. *Lawson*, 101 F. 2d 732, 5th Cir.) on which they could be run into the water in five or six minutes. The remote contingency that they might not be launched (they were in fact in operation a week or so after decedent's death—petition page 7) or that decedent might not operate one, should certainly not deprive him of the status of seaman "in being" while he was engaged in work so closely related to their navigation. There is always a possibility that engines, trains and cars definitely assigned for use in interstate commerce may, for one reason or another, not be so used, but that possibility has never been held to nullify the interstate character of

the work of preparing them for such use. Neither should the analogous possibility in the instant case preclude the decedent's being a seaman at the time of his death. This Court could well have held as a matter of law that decedent was a seaman. At the very least, it was a question for the jury.

We respectfully submit that the Court's statement that the boats had neither captain nor crew is misleading. Decedent and respondent's manager, who were both operators, were available to act as the one-man captain and crew of any of respondent's boats, had any then been ready for operation. Decedent and the manager, together with a third man to be hired, constituted the crew of respondent's four vessels. They were a kind of floating crew, licensed and ready at any time to operate any of the boats, of which the particular operator would then be the captain and crew. Since decedent and the manager were available for this purpose, it cannot be said that the boats had no captain or crew. Such a statement could only be made with regard to a larger vessel having a complement of a captain and a number of seamen, who had not yet been hired.

It is stated that the distinct nature of decedent's employment is emphasized by the fact that the boats, having been laid up for the winter, were not engaged in navigation at the time of his death. But *Hawn* v. *American S.S. Co.*, 107 F. 2d 999, 1000 (2d Cir.), and *Seneca Washed Gravel Corp.* v. *McManigal*, 65 F. 2d 779, 780 (2nd Cir.), cited by the Court, lend no support to its ultimate finding that decedent was not a seaman.

In the *Hawn* case the ship had been out of commission more than a year at the time of the plaintiff's injury, and she was about to be used for storage purposes, there being no present intention to return her to navigation. Plaintiff was one of a number of men hired by the day to move the ship by hand along a wharf so that the grain chutes by

means of which she was to be loaded with grain for storage could reach her hatches. Plaintiff's work was properly held to be like that of a longshoreman. In the *Seneca* case the court did remark that the ship was not in navigation, but placed its decision on the ground that, considering plaintiff's year-round duties (he was a night watchman) it appeared that he was never on the ship when she was under way, and performed no duties in aid of navigation at any time.

As we have heretofore pointed out, the Court of Appeals for the Second Circuit now regards primary duties as the test which determines the employee's status. (*Merritt-Chapman and Scott Corp.* v. *Willard,* 189 F. 2d 791, 792.) That court long before, in *Wheeler Shipyard* v. *Lowe,* 13 F. S. 863, 82 F. 2d 1022, had held that the essential nature of the employment, and not the work being done at the moment, was determinative of status. If this test is correct, then the question whether the ship is technically in or out of navigation becomes immaterial.

Antus v. *Interocean S.S. Co.*, 108 F. 2d 185, 187 (6th Cir.) is also cited by this Court. There the plaintiff, who had been a member of the crew, had been paid off at the end of the season but remained on board for the purpose of laying up the vessel. He was paid on a different basis for this work. He was injured while cleaning the bilges. Although denying him a recovery under the Jones Act, the court clearly implied that if he had been preparing the vessel for navigation he would have been a seaman within the provisions of the statute.

Properly regarded, the question whether a ship was at the time of an accident engaged in navigation is significant only insofar as it may throw light on the question whether the employee had in fact been hired as a member of a crew, or whether he merely had an expectation that he might be

so hired later when the crew should be selected. Where, as here, there was no time in the future at which a crew would be hired and organized, but the method was merely to rehire the preceding year's operators during the fitting out period, and there was no doubt that decedent had been rehired for the season, the question of navigation or no navigation is without significance.

Particularly appropriate is the language of the court in *United States* v. *Lindgren*, 28 F. 2d 725, 728 (4th Cir.):

> "Certainly seamen employed to take a ship to sea who are engaged in making her ready for the voyage are not to be denied the status of seamen and the benefit of the [Jones] Act merely because the vessel is not commissioned at the time."

Also in point is the following statement in *Jones* v. *Shepherd*, 20 F. S. 345 (S. D. Miss.):

> "The evidence is without dispute that prior to the time the boat laid up he was a member of the crew, and while it was not specifically mentioned that he would be a member of the crew when he returned to load the coal on the boat preparatory to its further use in the same kind of business, yet it is a reasonable inference that he immediately became a member of the crew in the same capacity and at the same rate of pay and in the performance of the same kind of duties he had theretofore been performing."

The Court has also held that the 1939 amendment of the F.E.L.A. may not be invoked to determine whether decedent was a seaman within the meaning of the Jones Act, because the amendment has no effect on the "right or remedy" of railway employees, but merely redefines "employee" so as to enlarge its scope. But if such redefinition extends the benefits of the Act to more employees, then it clearly extends its right and remedy to the additional group within its purview. A large group of railway employees were brought under the F.E.L.A. who had theretofore been

excluded. The 1939 amendment, which gave them its benefits, had a very definite effect on their rights and remedies. This being so, the Jones Act expressly requires its application in Jones Act suits.

The principle established by the 1939 amendment is that if any part of his duties brings the employee within the Act he is under it at all times. This is certainly a principle of recovery established for railroad employees, which Congress must be taken to have made applicable in Jones Act suits so far as the words and the Constitution permit. *O'Donnell* v. *Great Lakes Co.*, 318 U. S. 36, 39. Applied in the admiralty setting, it must extend the benefits of the Jones Act to all employees any part of whose duties are those of a seaman. If it be said to redefine the scope of railway employee, it must correspondingly redefine the scope of seaman.

Even if decedent were not under the Jones Act, the Longshoremen's and Harbor Workers' Compensation Act is not applicable, since it provides (33 U. S. C. A. Sec. 903) that "No compensation shall be payable in respect of the disability or death of . . . a master or member of a crew of any vessel, nor any person engaged by the master to load or unload or repair any small vessel under eighteen tons net. . . ." Respondent's boats were all under eighteen tons net (R. 103). Decedent was killed while he was fitting out or repairing them, and he had been engaged by respondent to make these "seasonal repairs", as an incident to his main employment. As none of the vessels had a "master", strictly speaking, we take it that respondent would come within this designation for the purposes of the Longshoremen's Act. That Act is clearly inapplicable in this case.

We respectfully suggest that great weight should have been given to the jury's finding in this case. *Gahagan Const.*

Co. v. *Armao,* 165 F. 2d 301, 305, 307 (1st Cir.). Surely it cannot be said that there was no evidence from which a reasonable man could conclude that decedent was a seaman. They had a right to consider the main purpose for which he was hired, and the relation of the work he was doing to that purpose. They could consider that it was customary for operators to fit out the boats, that the rate of pay was the same, and that decedent was a licensed navigator. Under these circumstances, they were clearly justified in finding that he was a seaman.

Respectfully submitted,

.....

JOSEPH D. RYAN,
Attorney for Petitioner.

Certificate of Counsel.

I, Joseph D. Ryan, counsel for Anna Desper, petitioner herein, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.

.....

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IN THE

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No. 231

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Petitioner,

VS.

STARVED ROCK FERRY COMPANY, A CORPORATION,
Respondent.

RESPONDENT'S RESPONSE TO PETITION FOR REHEARING.

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RESPONDENT'S RESPONSE TO PETITION FOR REHEARING.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

In response to petitioner's PETITION FOR REHEARING, respondent begs leave to invite the Court's attention to the fact that in such PETITION there are assigned no heretofore judicially recognized valid reasons or points for its allowance.

Petitioner has failed to set forth in her PETITION any one or more of the conventional grounds customarily associated with petitions for rehearing unless it can be

said that her statement "*that the heavy burden of work imposed upon this Court has prevented a majority of the Justices from giving adequate consideration to this case*" may be so regarded. Even a cursory reading of the opinion conclusively demonstrates that the majority of the Court were fully cognizant of the essential facts of this case and thoroughly informed as to the applicable legal precedents, propositions, and principles.

As clearly illustrating petitioner's lack of recognition of either the purpose of the reasonably permissible scope of a petition for rehearing, it will be noted that in her PETITION FOR REHEARING she has failed to state (1) any points overlooked or misapprehended by this Honorable Court; (2) to state any essential fact or facts which were overlooked or misapprehended by the Court; (3) that the Court overlooked any relevant authorities cited by either party; (4) that the Court's decision is contrary to or at variance with the decisions in any cases decided by it or other courts, or (5) that any new propositions of law have come to petitioner's attention since the briefs were filed and argument had in the instant case, which she had no opportunity to present previous to this Petition.

Actually, petitioner's PETITION FOR REHEARING constitutes merely a re-argument of her case and presents the same arguments in somewhat different form as previously made by petitioner in her briefs heretofore filed in this cause.

It is respectfully submitted—and respondent is unable to find any authority which holds to the contrary—that it is not the purpose of a PETITION FOR REHEARING to permit a second presentation of arguments which properly should have been and which in the instant case actually were presented in the party's brief and were before the

Court when the cause was under consideration. (Cyclopedia Federal Procedure, sec. 6336.)

It is further respectfully submitted that petitioner's failure to specify any valid grounds for a rehearing is in no sense attributable to lack of diligence or effort on the part of her eminent counsel but instead is due to their inability to find in the Court's opinion any omission of essential facts, any overlooking or misapplication of relevant authorities, or any other grounds upon which a petition for rehearing might properly be predicated.

In this connection, it is respectfully submitted that it is now improper for either petitioner or respondent to reargue questions which the former's counsel stated upon oral argument of the cause before this Court had been thoroughly covered in (1) her PETITION FOR CERTIORARI, (2) the ANSWER thereto, and (3) the REPLY TO THE ANSWER.

The PETITION FOR REHEARING should be denied.

Respectfully submitted,

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